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WAIT A MINUTE! RESIDENTIAL EVICTION DEFENSE IN 2009 STILL IS MUCH MORE THAN "DID YOU PAY THE RENT?"

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I. INTRODUCTION

"Unlawful detainer is a civil proceeding, and the only issue for determination is whether the facts alleged in the complaint are true."[1] This often quoted statement by the Minnesota Court of Appeals has lulled many a landlord and tenant, as well as their counsel, into thinking that all eviction cases are simple matters of whether the tenant paid the rent or breached the lease, or failed to vacate after expiration of a lease or proper notice from the

1. Minneapolis Cmty. Dev. Agency v. Smallwood, 379 N.W.2d 554, 555 (Minn. Ct. App. 1985).

landlord. To the contrary, the law of evictions is a complex mixture of state statutes governing evictions and general landlord-tenant relations, the common law of property and contracts, and federal law governing fair housing and public and subsidized housing programs.

In 2001, the first edition of this article covered the landscape of state landlord-tenant statutes and common law.[2] This second edition updates the original article and discusses the sources of law governing the residential landlord-tenant relationship and evictions in particular. Developments in the interim include many new statutes addressing tenants of foreclosed properties,[3] and important court decisions concerning waiver of defenses,[4] stay of evictions pending other litigation,[5] limitations on defenses,[6] personal jurisdiction,[7] proper parties,[8] corporations,[9] habitability,[10] rental licenses,[11] building codes,[12] evidence,[13] part payment of rent,[14] redemption,[15] waiver of notice,[16] retaliation,[17] waiver of breach,[18] reasonable accommodation of disabilities,[19] illegal activity,[20] public and subsidized housing,[21] manufactured home

2. Lawrence R. McDonough, *Wait a Minute! Residential Eviction Defense Is Much More than "Did You Pay the Rent?,"* 28 WM. MITCHELL L. REV. 65 (2001), *quoted in* Conseco Loan Fin. Co. v. Boswell, 687 N.W.2d 646, 650 (Minn. Ct. App. 2004); *cited in* Lynn Jokela & David F. Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool*, 31 WM. MITCHELL L. REV. 1299, 1318 (2005); Robin R. Cockey, *Where Left Meets Right: A Case Study of Class-Based Economic Discrimination Through Zoning in Salisbury, Maryland*, 3 MARGINS: MD. L.J. RACE, RELIGION, GENDER & CLASS 71, 95 (2003).

3. *See infra* notes 367–76, 386, 388–97 and accompanying text.
4. *See infra* notes 39 and accompanying text.
5. *See infra* notes 46–50 and accompanying text.
6. *See infra* notes 126–39 and accompanying text.
7. *See infra* notes 140–69 and accompanying text.
8. *See infra* notes 161–69 and accompanying text.
9. *See infra* notes 191–95 and accompanying text.
10. *See infra* notes 221–57 and accompanying text.
11. *See infra* notes 243–50 and accompanying text.
12. *See infra* notes 33, 221 and accompanying text.
13. *See infra* notes 236 and accompanying text.
14. *See infra* notes 299–01 and accompanying text.
15. *See infra* notes 330–37 and accompanying text.
16. *See infra* notes 402–16 and accompanying text.
17. *See infra* notes 397–401 and accompanying text.
18. *See infra* notes 456–62 and accompanying text.
19. *See infra* notes 468–78 and accompanying text.
20. *See infra* notes 514–20 and accompanying text.
21. *See infra* notes 479–95 and accompanying text.

park lots,[22] material breaches,[23] property storage,[24] costs,[25] expungement of court files and tenant records,[26] judge review of referee decisions,[27] and appeals.[28]

This article begins with a brief description of the Minnesota statutes that address landlords and tenants, the eviction process, and the types of tenancies. It then continues with a detailed discussion of subject matter jurisdiction, procedural issues, procedural and substantive defenses, post-trial issues, and appeals. While this article focuses on the law as it affects landlords and tenants in Minnesota, it is representative of how the confluence of several legal sources makes the areas of eviction and general landlord-tenant law confusing and challenging, but also distinctive and fascinating.[29]

II. SUMMARY OF EVICTION ACTIONS AND LANDLORD-TENANT RELATIONSHIPS

A. Statutes and Cases

In 1998, the Minnesota legislature passed a re-codification of the existing landlord-tenant statutes in chapters 504 and 566 into a new chapter 504A. The legislature delayed the effective date of chapter 504A and the repeal date of chapters 504 and 566 one year to allow for study and comment of the re-codification. The purpose of chapter 504A was to make landlord-tenant laws more accessible to the public by placing them in one chapter and rewriting them in a more understandable form. A committee of

22. *See infra* notes 496–504 and accompanying text.
23. *See infra* notes 521–22 and accompanying text.
24. *See infra* notes 553–58 and accompanying text.
25. *See infra* notes 578–87 and accompanying text.
26. *See infra* notes 588–612 and accompanying text.
27. *See infra* notes 613–20 and accompanying text.
28. *See infra* notes 621–31 and accompanying text.
29. This article is based on LAWRENCE R. MCDONOUGH, RESIDENTIAL UNLAWFUL DETAINER & EVICTION DEFENSE (10th ed. 2008), *available at* http://povertylaw.homestead.com (follow Reading tab; then follow Residential Unlawful Detainer and Eviction Defense hyperlink under Housing section) (last visited Mar. 13, 2009). Unreported decisions discussed in this article were compiled for RESIDENTIAL UNLAWFUL DETAINER & EVICTION DEFENSE. They are available in electronic form from http://www.projusticemn.org (follow Civil Law hyperlink; then follow Library hyperlink; then Housing Law, Eviction Defense subfolder; then Eviction Defense/Unreported Cases folder) (last visited Mar. 13, 2009) (login required).

landlord and tenant attorneys reviewed chapter 504A and proposed in its place chapter 504B, which was an attempt to reach the goals of chapter 504A while better ensuring that the re-codification did not change state law.

In 1999, the legislature passed 504B. It replaces both 504A, which never went into effect, and 504 and 566, which it consolidated. Tenants and landlords should cite to 504B (the current statutes) and either 504 or 566 (the old statutes) because case law before 1999 cited the old statutes. This article contains citations to both the current statute and its old counterparts. Statutes enacted in 1999 and afterwards do not have old 504 and 566 versions.

As part of the re-codification creating chapter 504B, the term "unlawful detainer" was replaced with "eviction."[30] This article will use both terms because cases before 1999 often used the term "unlawful detainer."

Many cases interpreting landlord-tenant law are unreported, either at the state district court or court of appeals levels. Since creation of the Minnesota Court of Appeals, most appellate decisions discussing residential landlord-tenant law have been unpublished decisions of the court of appeals, rather than published decisions of the court of appeals or Minnesota Supreme Court. Unpublished decisions of the court of appeals may be of persuasive value, but are not precedent.[31]

Many cities have ordinances regulating landlord and tenant relationships. Although a state statute will rarely specifically preempt application of a contrary ordinance, localities are preempted from enforcing any ordinance or rule that requires an eviction following calls by a residential tenant for police or emergency assistance, nor can localities use such calls to penalize

30. MINN. STAT. § 504B.001 (2008) (formerly codified at MINN. STAT. § 566.18 (1998)).

31. *Id.* § 480A.08, subdiv. 3(c); Dynamic Air, Inc. v. Bloch, 502 N.W.2d 796, 800 (Minn. Ct. App. 1993). The *Dynamic Air* court noted that the trial court "committed error by relying upon an unpublished [court of appeals] opinion . . . ." 502 N.W.2d at 800. The court added, "a party may cite to an unpublished opinion affirming a trial court's exercise of discretion to persuade a trial court to exercise discretion in the same manner. It is, however, improper to rely on unpublished opinions as binding precedent." *Id.* However, counsel may have an ethical obligation to cite unpublished opinions adverse to counsel's client if that authority is the only opinion on point in the jurisdiction. Marcia A. Johnson, *Advisory Opinion Service Update*, BENCH & B. MINN., Oct. 1993, at 13.

or charge a fee to a landlord.[32] Local housing maintenance codes must conform to the state building code.[33]

B. Summary of an Eviction Action

An eviction action is a summary proceeding, created by statute, to allow the landlord or owner of rental property to evict the tenant or possessor of the property.[34] The landlord prepares a complaint, often using a form. The plaintiff files the case with the court administrator, who prepares a summons.[35] The defendant must be served at least seven days before the initial hearing, either by personal or substitute service.[36] The tenant may answer at the initial hearing.[37] The statute does not state whether the answer must be in writing.[38] Housing court rules specifically do not require a written answer.[39] A written answer, however, may be needed to preserve the record for appeal.[40]

In most courts, the initial hearing serves as an arraignment. If the defendant does not appear, the court will find for the plaintiff and issue a writ of recovery, formerly a writ of restitution.[41] If the defendant appears to contest the action, the court generally will

32. MINN. STAT. § 504B.205, subdiv. 3 (2008) (formerly codified at MINN. STAT. § 504.215 (1998)). *See infra* Part III(F)(14).

33. In *City of Morris v. Sax Invs., Inc.*, the court of appeals considered a challenge to a local habitability ordinance on the grounds that it was preempted by the state building code. 730 N.W.2d 551, 553 (Minn. Ct. App. 2007). The court concluded that the state building code did not preempt local regulation of habitability. *Id.* On appeal, the Minnesota Supreme Court held that the authority of municipalities to enact and enforce habitability standards for rental housing is constrained by the prohibition on municipal regulation of building code provisions in Minnesota Statutes section 16B.62, subdivision 1. City of Morris v. Sax Invs., Inc., 749 N.W.2d 1, 13 (Minn. 2008).

34. § 504B.001, subdiv. 4.

35. *Id.* § 504B.321, subdiv. 1 (formerly codified at § 566.05 (1998)).

36. *Id.* § 504B.331(a) (formerly codified at § 566.06 (1998)).

37. *Id.* § 504B.335(a) (formerly codified at § 566.07 (1998)).

38. *See id.* § 504B.335.

39. *See* MINN. GEN. R. PRAC. 610 (2008).

40. Andrzejek v. Hall, No. C5-88-2134, 1989 WL 32486, at *1 (Minn. Ct. App. Apr. 18, 1989) (holding that the issue of the trial court's refusal to allow defendant to present evidence of cause of disrepair and rent abatement was not preserved for appeal where defendant did not file an answer, object, or request leave to file an answer to conform to evidence). *But see* Christy v. Berends, No. A07-1451, 2008 WL 2796663, at *2 (Minn. Ct. App. July 22, 2008) (failing to plead waiver of breach defense did not waive defense).

41. MINN. STAT. § 504B.345, subdiv. 1(a) (2008) (formerly codified at MINN. STAT. § 566.09 (1998)).

schedule a trial for another day. If the defendant appears and does not contest the action, the court will find for the plaintiff, but might stay issuance of the writ of recovery for seven days.[42] In the Fourth and Second Judicial Districts,[43] a housing court referee presides over the arraignment,[44] which could include as many as fifty cases scheduled on the calendar. If a trial is necessary, the referee generally will schedule it for another day. The housing court rules provide for discovery.[45]

The court may continue the trial for up to six days without consent of the parties;[46] or, in certain circumstances, up to three months for a material witness if a bond is paid.[47] The court has discretion to continue the trial longer in the interests of judicial administration and economy.[48] As explained in the court's syllabus in a recent case at the court of appeals:

> A district court abuses its discretion by denying a motion to stay an eviction action when (1) an existing, separate district court action would be dispositive of the issues of possession and title to commercial real property involved in the eviction action and (2) the district court in the eviction action has concluded that some of the claims asserted in the first-filed action are essential to the defense of the eviction action.[49]

Minnesota Statutes section 325N.18 also requires the court to issue an automatic stay without imposition of a bond if a defendant makes a prima facie showing that the defendant commenced an illegal foreclosure reconveyance action.[50]

In limited circumstances, the court may require the defendant

42. *Id.*, subdiv. 2.

43. The Second Judicial District includes Ramsey County, which contains the city of St. Paul. The Fourth Judicial District includes Hennepin County, which contains Minneapolis.

44. MINN. GEN. R. PRAC. 602 (2008). Housing court procedures are based on a housing court calendar project promulgated in 1989. Law of June 2, 1989, ch. 328, art. 2, §§ 17–19, 1989 Minn. Laws.

45. MINN. GEN. R. PRAC. 612 (2008).

46. MINN. STAT. § 504B.341(a) (2008) (formerly codified at MINN. STAT. § 566.08 (1998)).

47. *Id.* § 504B.341(b).

48. Rice Park Prop. v. Robins, Kaplan, Miller & Ciresi, 532 N.W.2d 556, 556 (Minn. 1995) (noting that trial courts have "considerable discretion" to pursue efficient judicial administration and economy).

49. Bjorklund v. Bjorklund Trucking, Inc., 753 N.W.2d 312, 313 (Minn. Ct. App. 2008) (quoting syllabus by the court).

50. See *infra* Part IV(A).

to post rent or other security as a precondition to a trial or to raising a defense. Such requirements may include: continuance beyond six days for lack of a material witness; a bond to cover rent, which may accrue while the action is pending;[51] retaliatory rent increase defense; payment of the pre-increase rent to the court or to the plaintiff;[52] breach of the covenants of habitability defense; payment of withheld rent into court or in escrow or adequate security, whichever is more suitable;[53] and combined actions for nonpayment of rent and breach of the lease, with no payment unless the court finds that the tenant owes rent.[54]

It is not uncommon for the plaintiff to raise additional issues not pleaded in the complaint at the initial hearing or trial. The court should not hear these additional issues, because the summary nature of the action requires specificity in pleading[55] and the plaintiff may be entitled to restitution based only upon the unlawful possession alleged in the complaint.[56]

At trial, the plaintiff has the burden of proof by a preponderance of the evidence and the defendant may raise numerous statutory and common law defenses. The parties are entitled to a full trial and may demand a trial by jury.[57] The

51. § 504B.341(b)(5).

52. *Id.* § 504B.285, subdiv. 3 (formerly codified at § 566.03 (1998)).

53. *Id.* § 504B.161 (formerly codified at § 504.18 (1998)); MINN. GEN. R. PRAC. 608 (2008)); Fritz v. Warthen, 298 Minn. 54, 61–62, 213 N.W.2d 339, 343 (1973).

54. *See, e.g.*, § 504B.285, subdiv. 5; Kahn v. Greene, No. UD-1940330506, slip op. at 7 (Minn. Dist. Ct. May 25, 1994) (order dismissing unlawful detainer action) (ordering payment of rent on deposit in conformance with ruling).

55. *See* MINN. R. CIV. P. 8.01 (setting forth specific requirements for pleading).

56. *See, e.g.*, § 504B.285, subdiv. 1; Mac-Du Prop. v. LaBresh, 392 N.W.2d 315, 318–19 (Minn. Ct. App. 1986) (holding that plaintiff was not entitled to restitution because the complaint was based solely on failure to pay rent); Hurt v. Johnston, No. HC-000103513 (Minn. Dist. Ct. Jan. 28, 2000) (order dismissing plaintiff's breach of lease claim) (denying landlord's motion to amend complaint; dismissing action where landlord failed to attach the lease to the complaint to support a claim of breach of lease; and dismissing the landlord's claims of breach by unsanitary conditions).

57. MINN. STAT. § 504B.335(b) (2008) (formerly codified at MINN. STAT. § 566.07 (1998)). In *Soukup v. Molitor*, plaintiff and defendant had settled an eviction action by agreeing to dismiss the action and agreeing that if defendant defaulted on future rental payments, plaintiff could apply for a writ of restitution without further court action. 409 N.W.2d 253, 254 (Minn. Ct. App. 1987). However, after the stipulation for settlement was entered, plaintiff filed an eviction action alleging nonpayment of rent, holding over after notice, and breach of the lease. *Id.* The trial court entered judgment for plaintiff without a trial. *Id.* The court of appeals held that while the agreement may have waived defendant's right to a jury trial on the issue of nonpayment of rent, it did not waive his right to a jury

summary nature of the action does not relieve the court of the obligation to find facts specially and state separately its conclusions of law. Failure to include findings usually requires reversal unless the decision necessarily decides all disputed facts, or the undecided issues are immaterial.[58]

If the tenant prevails, the landlord may not evict the tenant at this time. If the landlord prevails, the court may immediately issue a writ of recovery or stay issuance of the writ for up to seven days. The landlord must then arrange for the sheriff or police to deliver the writ, which is a twenty-four-hour eviction notice.[59] If the tenant does not move, the landlord must schedule an eviction of the tenant with the sheriff or police.[60] The landlord must store the tenant's property, either on site or with a storage company, for up to sixty days.[61] If a housing court referee heard the case in the Second or Fourth Judicial Districts, a party may request a district court judge to review the referee's decision.[62] Either party may appeal from entry of judgment within ten days of entry of judgment.[63]

A collateral estoppel effect of an eviction judgment does not prevent the tenant from raising, in another action, an issue that could have been raised in the eviction action but was not raised, or was raised in the eviction action but later withdrawn,[64] an issue raised in the eviction action on which the court declined to rule,[65] or issues of title.[66]

trial on all issues. *Id.* at 255.

58. Minneapolis Cmty. Dev. Agency v. Mark Lee Prods., Inc., 411 N.W.2d 599, 601 (Minn. Ct. App. 1987) (citing MINN. R. CIV. P. 52.01); Crowley Co. v. Metro. Airports Comm'n, 394 N.W.2d 542, 545 (Minn. Ct. App. 1986) (holding that the trial court's failure to make findings of fact or conclusions of law was reversible error).

59. MINN. STAT. § 504B.365, subdiv. 1 (2008) (formerly codified at MINN. STAT. § 566.17 (1998)).

60. *Id.*

61. *Id*, subdiv. 3.

62. MINN. GEN. R. PRAC. 611(a) (2008).

63. MINN. STAT. § 504B.371, subdiv. 2 (2008) (formerly codified at MINN. STAT. §§ 566.11–.14 (1998)).

64. Steinberg v. Silverman, 186 Minn. 640, 642–43, 244 N.W. 105, 105–06 (1932).

65. Seifred v. Zabel, 369 N.W.2d 571, 574 (Minn. Ct. App. 1985).

66. Pushor v. Dale, 242 Minn. 564, 568–69, 66 N.W.2d 11, 14 (1954). *See infra* notes 126–39 and accompanying text.

C. Creation of a Landlord-Tenant Relationship

A landlord-tenant relationship arises when "one person occupies the premises of another in subordination to that other's title and with his consent."[67] The relationship is created by a conveyance of property for a term less than the conveying party has in the premises, in consideration of rent, leaving the landlord a reversionary interest.[68] The term "lease" is generally used to refer to the physical document creating the tenancy; although it is common to refer to a tenancy created by an oral agreement as an "oral lease." The lease is both a conveyance of the right to possession of real property and a contract creating the terms for the landlord-tenant relationship.[69] Often the term "lease" and "tenancy" are used interchangeably to describe the relationship between the landlord and tenant. The tenant's interest in the property is a leasehold interest.[70]

D. Types of Private Tenancies

A tenancy for a fixed term is also called a "tenancy for years," and can be for any duration. Generally, during the term of the lease, the terms of the agreement cannot be changed without the consent of the parties. The landlord cannot evict the tenant unless the tenant breached (i.e., violated) the lease. The tenant cannot terminate the lease before the end of the term without the landlord's consent, unless a constructive eviction occurs[71] or the tenant enters the military service and provides written notice to the landlord.[72] If a term lease becomes void under the statute of frauds, the law will imply the creation of a tenancy at will.[73] Upon expiration of an initial term lease, without any action by the parties to renew the lease, the parties' continuation of the landlord-tenant relationship becomes a month-to-month tenancy and cannot be

67. Gates v. Herberger, 202 Minn. 610, 612, 279 N.W. 711, 712 (1938); 30 DUNNELL MINN. DIG. *Landlord & Tenant* § 1.00 (5th ed. 2008).

68. *See* State v. Bowman, 202 Minn. 44, 46, 279 N.W. 214, 215 (1938); DUNNELL MINN. DIG. *Landlord & Tenant* § 1.00, *supra* note 67.

69. Local Oil Co. v. City of Anoka, 303 Minn. 537, 539, 225 N.W.2d. 849, 851 (1975).

70. *See* Sanford v. Johnson, 24 Minn. 172, 173 (1877).

71. MINN. STAT. § 504B.131 (2008) (formerly codified at MINN. STAT. § 504.05 (1998)).

72. *See infra* Part IV(C)(12).

73. *See* Fisher v. Heller, 174 Minn. 233, 236, 219 N.W. 79, 80 (1928).

based on the original written lease.[74]

A periodic tenancy is a tenancy made up of an indefinite series of rental periods, which either party may terminate by giving written notice before the last rental period.[75] A periodic tenancy is also created where a tenant of urban real estate holds over after expiration of a lease, with a period of the tenancy being the period between payments.[76] In the most common form—the month-to-month tenancy—written notice must be given before the last month of the tenancy.[77]

A tenancy at will has an uncertain term and is created where the parties agree to a tenancy without a fixed term,[78] where the lease is void,[79] or where a tenant remains on the property after expiration or termination of the lease (holdover tenant) and continues to pay rent.[80] Either party may terminate a tenancy at will in the same manner as a periodic tenancy.[81]

A tenancy at sufferance describes the legal limbo that exists when a tenant holds over after expiration or termination of the

74. Urban Inv., Inc. v. Thompson, No. UD-1950626525, slip op. at 3–5 (Minn. Dist. Ct. Aug. 10, 1995) (order dismissing plaintiff's unlawful detainer action with prejudice).

75. The notice period must be the lesser of the interval between when rent is due, or three months. MINN. STAT. § 504B.135 (2008) (formerly codified at MINN. STAT. § 504.06 (1998)). Where there are no rent intervals, the notice period is three months. Marlett v. Honsey, No. 27CVHC 09-66, slip op. at 2 (Minn. Dist. Ct. Jan. 22, 2009) (order allowing defendant to remain in possession of premises).

76. MINN. STAT. § 504B.141 (2008) (formerly codified at MINN. STAT. § 504.07 (1998)).

77. *See id.* § 504B.135; Johnson v. Hamm Brewing Co., 213 Minn. 12, 16, 4 N.W.2d 778, 781 (1942); Oesterreicher v. Robertson, 187 Minn. 497, 501, 245 N.W. 825, 826 (1932) (holding that "with our decisions that the rental month begins on the day the lease is made, . . . notice served on the first of a rental month is not in time to terminate the tenancy with the end of that month."); Markoe v. Naiditch & Sons, 303 Minn. 6, 7, 226 N.W.2d 289, 290 (1975) (holding that strict compliance is required); Eastman v. Vetter, 57 Minn. 164, 166, 58 N.W. 989, 989–90 (1894) (finding a defective notice void and not effective at end of next month).

78. *See* Wiedemann v. Brown, 190 Minn. 33, 40–41, 250 N.W. 724, 727 (1933) (holding that one who has permission by an owner to hold possession of the owner's land(s), but without a fixed term, is a tenant at will).

79. Hagen v. Bowers, 182 Minn. 136, 137–38, 233 N.W. 822, 823 (1930) (holding that the plaintiff was a tenant at will whose tenure could not be terminated without the statutory notice).

80. Paget v. Elec. Eng'g Co., 82 Minn. 244, 246, 84 N.W. 800, 801 (1901) (holding that the tenant was a tenant at will and he was required to give notice, directed by statute, in order to terminate the tenancy).

81. *See* § 504B.135.

lease and the landlord does not accept rent.[82] It is not a true tenancy because there is no landlord-tenant relationship between the parties but the landlord must still bring an eviction action to evict the tenant.[83]

E. Domestic Partners

Domestic partners may or may not be in a landlord-tenant relationship, and if they are not, an eviction action might not be the appropriate forum to determine their possessory interests in the property. In *Shustarich v. Fowler*, the plaintiff and defendant first lived in the defendant's home.[84] Then the plaintiff and defendant moved from the defendant's home to a second property, and the parties then living at the second property moved to defendant's old home.[85] The plaintiff took title to the new property, and the defendant contributed several thousand dollars from the sale of her home to a new roof and appliances.[86] The parties kept separate expenses.[87] After the defendant obtained an order for protection, plaintiff gave notice and filed an unlawful detainer action.[88] The court concluded that the plaintiff failed to establish a landlord-tenant relationship and that the defendant was entitled to assert an interest in the premises.[89] Further, an unlawful detainer action is a summary remedy that is inappropriate to try issues of title or to substitute for an action in ejectment.[90] The court denied restitution of the premises.[91]

82. *See, e.g.*, *Wiedemann*, 190 Minn. at 40–41, 250 N.W. at 727.

83. MINN. STAT. § 504B.285, subdiv. 1 (2008) (formerly codified at MINN. STAT. § 566.03 (1998)); *id.* § 504B.301 (formerly codified at § 566.02 (1998)).

84. No. UD-1960604520 (Minn. Dist. Ct. July 5, 1996) (order denying restitution).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* *See also In re* Estate of Ericksen, 337 N.W.2d 671 (Minn. 1983) (holding that Minnesota statutes governing contracts between unwed, cohabitating individuals of the opposite sex were not intended to be applicable to a claim by a cohabitant to protect her own property that was acquired wholly independent of any service contract related to cohabitation). *But see* Stock v. Beaulieu, No. C1-95-39, slip op. at 2–3 (Minn. Dist. Ct. Mar. 9, 1995) (order granting judgment for defendant) (acknowledging that Minnesota Statutes section 513.075, which requires a contract between a man and a woman living together out of wedlock be in writing to enforce property and financial rights, can be

F. Implied Lease Terms

All oral and written leases include implied statutory covenants of habitability and illegal activity.[92] When the parties have neither a written nor an oral agreement of undisputed terms but act as if there is a rental agreement by continuing all the indicia of a landlord-tenant relationship, the court must determine the applicable terms by their actions and the surrounding circumstances.[93] A new landlord takes the land with the rights and liabilities that existed between the old landlord and the tenant.[94] The old landlord's rights and obligations transfer over to the new landlord if the tenant had notice of the change.[95]

G. Statutory Definitions of Landlord and Tenants

Minnesota Statutes chapter 504B broadly defines the landlord and tenant relationship. "Residential tenant" means "a person who is occupying a dwelling in a residential building under a lease or contract, whether oral or written, that requires the payment of money or exchange of services, all other regular occupants of that dwelling unit, or a resident of a manufactured home park."[96] "Residential building" means "a building used in whole or in part as a dwelling, including single-family homes, multiple-family units such as apartments, and structures containing both dwelling units and units used for non-dwelling purposes, and includes a

subverted where there are "extenuating circumstances justifying the lack of a written agreement" and that plaintiff was not entitled to evict defendant from the home where they had been residing during plaintiff's probation). *See infra* notes 126–39 and accompanying text (litigating title issues in eviction).

92. MINN. STAT. § 504B.161, subdiv. 1 (2008) (formerly codified at MINN. STAT. § 504.18 (1998)); *id.* § 504B.171, subdiv. 1 (formerly codified at § 504.181 (1998)).

93. *See generally* 8 DUNNELL MINN. DIGEST *Contracts* § 2.04 (5th ed. 2003). *See also infra* note 307 and accompanying text.

94. Glidden v. Second Ave. Inv. Co., 125 Minn. 471, 473–74, 147 N.W. 658, 659 (1914); Farmers Ins. Exch. v. Ouellette, No. C8-97-1504, 1998 WL 74243, at *2 (Minn. Ct. App. Feb. 24, 1998) (affirming lower court's entry of judgment for plaintiff and holding that new landlord assumed terms of modified lease under the terms of the lease and Minnesota case law).

95. *See* Snortland v. Olsonawski, 307 Minn. 116, 120, 238 N.W.2d 215, 217–18 (1976); Pillsbury Inv. Co. v. Otto, 242 Minn. 432, 437, 65 N.W.2d 913, 916 (1954); Borer v. Carlson, 450 N.W.2d 592, 594 (Minn. Ct. App. 1990).

96. MINN. STAT. § 504B.001, subdiv. 12 (2008) (formerly codified at MINN. STAT. § 504A.001, subdiv. 11 (1998)).

manufactured home park."[97] "Landlord" means "an owner of real property, a contract for deed vendee, receiver, executor, trustee, lessee, agent, or other person directly or indirectly in control of rental property."[98] Chapter 327C governs rental of lots in manufactured or mobile home parks.[99]

H. Public and Subsidized Rental Housing

Tenancies in public and government-subsidized housing are a hybrid of traditional periodic and fixed term tenancies. On one hand, the tenancy has an indefinite term without an expiration date. On the other hand, with some exceptions, the landlord cannot terminate the tenancy simply by giving notice; the landlord must have good cause to terminate the tenancy.[100] The tenant's rent is usually based on a percentage of the tenant's adjustable income.[101] There are several categories of public and government-subsidized housing, each with somewhat different rules.[102]

97. *Id.*, subdiv. 11. (formerly codified at § 504A.001, subdiv. 10 (1998)).

98. *Id.*, subdiv. 7 (formerly codified at § 504A.001, subdiv. 5 (1998)).

99. A manufactured home park is land on "which two or more occupied manufactured homes are located" and where facilities are open for more than three seasons. *Id.* §§ 327C.01, subdiv. 5, 327.14, subdiv. 3. The rental agreement must be in writing and include elements required by statute. *Id.* § 327C.02, subdiv. 1. Sixty days' notice is required to change any park rules. *Id.*, subdiv. 2. However, a rule "adopted or amended after the resident initially enters into a rental agreement may be enforced against that resident only if the new or amended rule is reasonable and is not a substantial modification of the original agreement." *Id.* A park owner may terminate the tenancy only for cause. *Id.* § 327C.09, subdiv. 1.

100. *See generally* NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS § 14.2 (3d ed. 2004 & Supp. 2006–07) [hereinafter NATIONAL HOUSING LAW PROJECT] (discussing good cause issues and regulations regarding public housing, FHA-subsidized housing, Section 8 housing, and Section 8 vouchers); F. FUCHS, INTRODUCTION TO HUD PUBLIC & SUBSIDIZED HOUSING PROGRAMS: A HANDBOOK FOR THE LEGAL SERVICES ADVOCATE (1993).

101. *See* NATIONAL HOUSING LAW PROJECT, *supra* note 100, § 3.3.

102. First, public housing is owned and operated by local housing authorities with assistance from the federal government. FUCHS, *supra* note 100, at 1. The housing authority may terminate the tenancy for serious violations of a material lease term or other good cause. 24 C.F.R. § 966.4(l) (2008).

Second, a number of programs provide federal funds directly to landlords in connection with the building, renovation, or operation of subsidized housing units. *See* FUCHS, *supra* note 100, at 103, 162, 184, 231, 261, 270, 291. These programs include Section 8 new construction and substantial rehabilitation (*see* 24 C.F.R. §§ 880–81) and set aside (*see* 24 C.F.R. § 886); Section 8 administered by state housing finance agencies (*see* 24 C.F.R. § 883), or owned and operated by the United States Department of Housing and Urban Development (HUD) (*see* 24 C.F.R. §§ 219, 236, 245–48); and Section 236 (*see* 24 C.F.R. §§ 219, 236, 245–48), Section 221 (*see* 24 C.F.R. §§ 219, 236, 245–48), and 202 programs (*see* 24 C.F.R.

I. Special Relationships

Caretaker occupancy of the premises was traditionally viewed as incidental to the caretaker's employment, and once the landlord terminated the employment, the employee who did not vacate immediately became a trespasser who could be evicted without court process.[103] However, chapter 504B now includes caretakers in the definition of tenant.[104]

§ 881). *See id.* The landlord may terminate the tenancy for material noncompliance with the lease, material failure to meet obligations under state landlord-tenant law or other good cause. 24 C.F.R. § 247.3(a). Some of these programs, including the Section 8 moderate rehabilitation and project based certificate programs, also provide for local housing authority inspection for compliance with its housing code, and allow the housing authority to terminate the tenancy if the unit is not in compliance. *See* FUCHS, *supra* note 100, at 253, 285; 24 C.F.R. § 882.516.

Third, and similar to the second set of programs discussed above, the federal Low-Income Housing Tax Credit Program provides assistance to landlords in connection with the building, renovation, or operation of subsidized housing units. *See* 26 U.S.C. § 42 (2006). Most tenants may not know that they are in a low-income housing tax credit project, because their rent may not be based on their income. *See generally* 26 U.S.C. § 42(d) (providing minimum qualifications for being considered a low income housing project for purposes of this section as allowing some units to be occupied by non-low income tenants). The Minnesota Housing Finance Agency (MHFA), as well as redevelopment agencies in Minneapolis and St. Paul, have listings of low income housing tax credit projects. *See, e.g.*, MHFA List of Tax Credit Properties, http://www.mnhousing.gov/housing/tax-credits/compliance/index.aspx (last visited Mar. 13, 2009).

Fourth, some programs provide the tenant with a housing voucher, which allows the tenant to find a landlord willing to participate in the program. *See* FUCHS, *supra* note 100, at 304; 24 C.F.R. § 982. These programs include the Section 8 voucher programs. 24 C.F.R. § 982. The housing authority sends a monthly rent subsidy to the landlord and the tenant pays the remaining share of the rent. *Id.* The landlord may terminate the tenancy for serious or repeated violations of the lease; violation of federal, state, or local law which imposes an obligation on the tenant in connection with occupancy of the unit; or other good cause. 24 C.F.R. § 982.310. Also, the housing authority can terminate the tenancy if the unit is not in compliance with its housing code. *See id.*

For more information on public and government-subsidized housing, *see* NATIONAL HOUSING LAW PROJECT, *supra* note 100, § 14.2 (discussing public housing, FHA-subsidized housing, Section 8 housing, Section 8 vouchers, and related regulations).

103. *See* Lightbody v. Truelsen, 39 Minn. 310, 313, 40 N.W. 67, 68 (1888); Trs. of E. Norway Lake Norwegian Evangelical Lutheran Church v. Froislie, 37 Minn. 447, 449–50, 35 N.W. 260, 262 (1887).

104. MINN. STAT. § 504B.001, subdiv. 12 (2008) (formerly codified at MINN. STAT. § 504A.001, subdiv. 11 (1998)); *see* Mountainview Place Apartments v. Ford, No. 94CV1492, slip op. at 3–4 (Colo. County Ct. Mar. 24, 1994) (order granting judgment in favor of defendant) (holding that Section 8 tenancy was unaffected by employment agreement, and termination of employment was not good cause

A hotel resident may be a tenant. "Hotel" means a building "which is kept, used or advertised as, or held out to the public to be, a place where sleeping or housekeeping accommodations are supplied for pay to guests for transient occupancy."[105] "Transient occupancy" means :

> [O]ccupancy when it is the intention of the parties that the occupancy will be temporary. There is a rebuttable presumption that, if the unit occupied is the sole residence of the guest, the occupancy is not transient. There is a rebuttable presumption that, if the unit occupied is not the sole residence of the guest, the occupancy is transient.[106]

III. SUBJECT MATTER JURISDICTION

Self-help evictions are prohibited.[107] The eviction action is a summary proceeding, created by statute, which provides an alternative to the common law ejectment action.[108] The action is for possession of the premises and not for damages.[109]

Section 504B.285 provides the most common basis for subject matter jurisdiction:

1. Holding over after sale on an execution or judgment, expiration of the redemption period following mortgage foreclosure, or termination of a contract for deed.[110]
2. Holding over after expiration of the term of the lease.[111]
3. Breach of lease.[112]
4. Nonpayment of rent.[113]
5. Holding over after termination of the tenancy by notice

for eviction).

105. MINN. STAT. § 327.70, subdiv. 3 (2008).

106. *Id.*, subdiv. 5.

107. Berg v. Wiley, 264 N.W.2d 145, 149–51 (Minn. 1978); MINN. STAT. § 504B.225 (2008) (formerly codified at MINN. STAT. § 504.25 (1998)); *id.* § 504B.231(a) (formerly codified at § 504.255 (1998)); *id.* § 504B.281 (formerly codified at § 566.01 (1998)); *id.* § 504B.301 (formerly codified at § 566.02 (1998)); *id.* § 504B.375, subdiv. 1 (formerly codified at § 566.175 (1998)).

108. *See Berg*, 264 N.W.2d at 151; Warnert v. MGM Prop., 362 N.W.2d 364, 366–67 n.1 (Minn. Ct. App. 1985); § 504B.301.

109. *See* §§ 504B.301, 504B.285 (formerly codified at § 566.03 (1998)).

110. § 504B.285, subdiv. 1(1)(i)–(ii).

111. *Id.*, subdiv. 1(1)(ii)(A).

112. *Id.*, subdiv. 1(1)(ii)(B).

113. *Id.*, subdiv. 1(2).

to quit.[114]

The landlord may combine actions for nonpayment of rent and material lease violations.[115] These claims shall be heard as alternative grounds.[116] The hearing is bifurcated to first cover a material violation of the lease, and then nonpayment of rent if the landlord does not prevail on the material lease violation claim. The tenant is not required to pay into court outstanding rent, interest, or costs to defend against the material lease violation claim.[117] If the court reaches the nonpayment of rent claim, the tenant is permitted to present defenses.[118] The tenant shall be given up to seven days to pay any rent and costs determined by the court to be due, either into court or to the landlord.[119]

The court also has jurisdiction for the claim of unlawfully detaining the premises after having entered unlawfully or forcibly.[120] Unlawful detention includes a seizure on residential rental property of contraband or a controlled substance manufactured, distributed or acquired in violation of Chapter 152 (Drugs, Controlled Substances) and with a retail value of $100 or more, if the tenant does not have a defense.[121]

There are some claims that are not appropriate for an eviction action. A tenant cannot bring an eviction action against the landlord who wrongfully reentered the premises. The lockout statute provides the tenant's remedy.[122] A state court does not have jurisdiction over an eviction action involving the right of an enrolled member of an Indian tribe to possession of property held in trust for Indians by the United States.[123]

In *Rice Park Properties v. Robins, Kaplan, Miller & Ciresi*, the Minnesota Supreme Court reversed the court of appeals and

114. *Id.*, subdiv. 1(3).
115. *Id.*, subdiv. 5(a).
116. *Id.*
117. *Id.*, subdiv. 5(b).
118. *Id.*, subdiv. 5(c).
119. *Id.*
120. *Id.* § 504B.301 (formerly codified at § 566.02 (1998)).
121. *Id.*; MINN. STAT. § 609.5317 (2008).
122. MINN. STAT. § 504B.375 (2008) (formerly codified at MINN. STAT. § 566.175 (1998)). *See* Berg v. Wiley, 303 Minn. 247, 250–51, 226 N.W.2d 904, 906–07 (1975).
123. White Earth Hous. & Redevelopment Auth. v. J.F., No. C8-91-224, slip op. at 2–3 (Minn. Dist. Ct. Feb. 5, 1992) (order granting motion to dismiss) (determining that the state court was without jurisdiction); All Mission Indian Hous. Auth. v. Silvas, 680 F. Supp. 330 (C.D. Cal. 1987); 28 U.S.C. § 1360(b) (2006).

affirmed the district court decision to stay an eviction action pending final disposition of a related and earlier filed declaratory judgment action commenced by the tenant.[124] The court's jurisdiction is limited to determining present possessory rights of the parties, and the trial court cannot exceed its jurisdiction by ruling on prospective issues, such as a future rent increase.[125]

IV. DEFENSES TO EVICTION

A. Limitations on Defenses

In the old municipal or county courts, the court did not have jurisdiction to hear questions of title or equitable defenses.[126] However, the defendant could commence a separate action in district court and seek to enjoin prosecution of the eviction action,[127] or remove the action to district court.[128] Unification of trial courts in the district court should have altered the above limitation.[129] However, subsequent decisions affirmed the rule,[130] even though the rule was probably based on the jurisdictional limits of municipal and county courts, rather than an inherent jurisdictional limitation for eviction actions. In 2006, the court of appeals changed course, correctly recognizing the effect of unification. In *Real Estate Equity Strategies, LLC v. Jones*, the court reviewed the history of litigation of title issues in eviction actions, dating back to the time when evictions were heard in county and

124. 532 N.W.2d 556, 556 (Minn. 1995). In *Stein v. J.D. White, Inc.*, the court affirmed dismissal of the action, noting that "[w]hen a pending parallel action will properly resolve the dispute which has been incorrectly brought as an unlawful detainer action, trial courts may grant procedural dismissals without ruling on the merits." No. CO-91-2164, 1992 WL 77521, at *2 (Minn. Ct. App. Apr. 21, 1992) (order affirming dismissal of the action). The court also noted that "[i]nterpretations of complex lease provisions, particularly when collateral to the basic rent obligation, are not amenable or appropriate to the type of summary disposition envisioned by the unlawful detainer act." *Id.* at *1. The court added that decisions on the merits "merely determine[] the right to present possession of the property and do[] not determine the ultimate rights of the parties." *Id.* at *2.

125. Eagan E. Ltd. P'ship v. Powers Investigations, Inc., 554 N.W. 2d 621, 621 (Minn. Ct. App. 1996).

126. Dahlberg v. Young, 231 Minn. 60, 67–68, 42 N.W.2d 570, 576 (1950).

127. William Weisman Holding Co. v. Miller, 152 Minn. 330, 332, 188 N.W. 732, 733 (1922).

128. Albright v. Henry, 285 Minn. 452, 460, 174 N.W.2d 106, 110 (1970).

129. Sternaman v. Hall, 411 N.W.2d 18, 19 n.1 (Minn. Ct. App. 1987).

130. Fed. Land Bank of St. Paul v. Obermoller 429 N.W.2d 251, 257 (Minn. Ct. App. 1988).

municipality courts of limited jurisdiction.[131] The court concluded that unification of the trial courts removed any limitations based on the nature of the court, leaving only limitations based on the summary nature of the eviction action, which do not preclude litigation of title.[132]

Before *Real Estate Equity Strategies*, there was some confusion over whether the defendant could litigate the plaintiff's compliance with procedural requirements of mortgage foreclosure and contract for deed cancellation statutes. The defendant clearly could raise non-compliance with statutory notice, service requirements for mortgage foreclosure, and contract for deed cancellation,[133] but was precluded from raising ultimate legal or equitable defenses in an eviction action.[134] The decision in *Real Estate Equity Strategies* to allow litigation of title issues in eviction actions should eliminate this distinction.[135]

Unfortunately, the Minnesota Court of Appeals is still deciding the issue inconsistently. Just months before the *Real Estate Equities Strategies* decision, and even afterwards, the court of appeals was still following the earlier line of cases, holding that the eviction court could not adjudicate legal and equitable rights of ownership.[136]

Since the *Real Estate Equity Strategies* decision, the legislature amended Minnesota Statutes section 325N.18 to include a new subdivision that requires the court to issue an automatic stay without imposition of a bond if a defendant makes a prima facie showing that the defendant commenced an illegal foreclosure

131. 720 N.W.2d 352 (Minn. Ct. App. 2006).

132. *Id.* at 355–58.

133. MINN. STAT. § 559.21 (2004 & Supp. 2005); Enga v. Felland, 264 Minn. 67, 70–71, 117 N.W.2d 787, 789–90 (1962).

134. Dahlberg v. Young, 231 Minn. 60, 67–68, 42 N.W.2d 570, 576 (1950). In *Dahlberg* the Minnesota Supreme Court made the distinction between the claim that an instrument is voidable as an equitable issue, and the claim that an instrument is void as not an equitable issue, concluding that the claim of fraud involved whether the instrument was voidable; thus it was an equitable issue that could not be raised in an unlawful detainer action. *Id.* at 67–68, 42 N.W.2d at 575–76. The defendant could assert that challenging compliance with procedural requirements was not an equitable issue, since it involved a determination of whether the contract for deed cancellation or mortgage foreclosure was void, rather than voidable. *Id.*

135. 720 N.W.2d at 355–58.

136. *See* RedStar Capital, LLC v. Rex, No. A07-1873, 2008 WL 5136002 (Minn. Ct. App. Dec. 9, 2008); Ketterling v. Hamilton, Nos. A05-1872, A05-2119, 2006 WL 2258053 (Minn. Ct. App. Aug. 8, 2006); Sundberg v. Sundberg, No. A05-1845, 2006 WL 1806394 (Minn. Ct. App. July 3, 2006).

reconveyance action, raises the defense under section 504B.121 of an illegal foreclosure reconveyance, or asserts a claim of fraud, false pretense, false promise, misrepresentation, misleading statement, or deceptive practice in connection with a foreclosure reconveyance.[137] The defendant also must show that the defendant owned the foreclosed residence, the foreclosure reconveyance, and continued occupancy of the property.[138] The automatic stay expires if the foreclosed homeowner fails to commence a foreclosure reconveyance action within ninety days of issuance of the stay.[139]

B. Lack of Personal Jurisdiction Due to Improper Service

Unlike other civil actions, the plaintiff files the action and obtains the summons from the court.[140] A minor technical error in the standard form does not negate the eviction claim.[141] The complaint must be signed.[142] The summons and complaint shall be served not less than seven and no more than fourteen days before the initial court appearance.[143] The time period excludes the date of service but includes the date of the initial hearing.[144] Section 504B.331 provides for the methods of service: (1) by delivery to the defendants; (2) if the defendants cannot be found in the county, substituted service by delivery at the defendant's residence to a family member or other person of suitable age and discretion residing at the defendant's residence; or (3) by mail and posting, if service has been attempted at least twice on different days, with at least one of the attempts between 6:00 p.m. and 10:00 p.m., and

137. MINN. STAT. § 325N.18, subdiv. 6(a) (2008).
138. *Id.*, subdiv. 6(a)(2)–(3).
139. *Id.*, subdiv. 6(c).
140. MINN. STAT. § 504B.321 (2008) (formerly codified at MINN. STAT. § 566.05 (1998)). Service may not occur before filing the action. Stevens Cmty. Assoc. v. REDACTED, No. HC-01003507 (Minn. Dist. Ct. Oct. 12, 2000) (order of dismissal) (dismissing action because affidavit of service claimed service before action was filed).
141. Times Square Shopping Ctr., LLP, v. Tobacco City, Inc., 585 N.W. 2d 791, 791 (Minn. Ct. App. 1998) (holding that the failure to attach the unlawful detainer complaint to the eviction notice was not enough grounds for dismissal).
142. In *Nygren v. Nix*, the court dismissed the action for preparing and issuing a summons that should have been prepared and issued by the court, and for failure to sign the complaint. No. C1-96-42, slip op. at 2 (Minn. Dist. Ct. Jan. 25, 1996) (order of dismissal).
143. §§ 504B.321, subdiv. 1(d), 504B.331 (formerly codified at § 566.06 (1998)).
144. MINN. STAT. § 645.15; Twp. Bd. v. Lewis, 305 Minn. 488, 491, 234 N.W.2d 815, 818 (1975).

the plaintiff or counsel files an affidavit stating (a) that the defendant cannot be found or the affiant believes that the defendant is not in the state, and (b) that a copy of the summons has been mailed to the defendant at the defendant's last address known to the plaintiff.[145] Any person not named as a party to the action may serve the summons.[146] If the defendant is confined to a state institution, the chief executive officer at the institution must also be served.[147] Strict compliance with service requirements is a precondition to personal jurisdiction.[148]

General service defenses include: (1) service less than seven days before the initial hearing,[149] (2) service on legal holidays,[150] and (3) service by a named plaintiff or agent.[151]

145. § 504B.331.

146. MINN. R. CIV. P. 4.02.

147. *Id.* 4.03(a).

148. *See* Bloom v. Am. Express Co., 222 Minn. 249, 253, 23 N.W.2d 570, 573 (1946); B&J Prop. Mgmt. v. Gates, No. UD-01970602519 (Minn. Dist. Ct. June 12, 1997) (order granting motion to dismiss unlawful detainer action). Some decisions outside the eviction context have affirmed improper service where the defendant had actual notice. Larson v. Hendrickson, 394 N.W.2d 524, 526 (Minn. Ct. App. 1986). Other decisions, however, continue to apply service requirements strictly. Allstate Ins. Co. v. Allen, 590 N.W.2d 820, 821–23 (Minn. Ct. App. 1999); Patterson v. Wu Family Corp., 594 N.W.2d 540, 546–49 (Minn. Ct. App. 1999), *rev'd on other grounds*, 608 N.W.2d 863 (Minn. 2000).

149. § 504B.331(a)–(b); Judge v. Rio Hot Props., Inc., No. UD-1981202903 (Minn. Dist. Ct. July 7, 1999) (order dismissing unlawful detainer action) (holding service was less than seven days before the hearing). The summons must be posted for seven days, but not to the exact hour. Cent. Internal Med. Assoc. P.A. v. Chilgren, No. C2-00-36, 2000 WL 987858, at *2 (Minn. Ct. App. July 18, 2000).

150. MINN. STAT. § 645.44, subdiv. 5 (2008). The prohibition on service of a summons on Sunday was repealed in 2005. Act of June 2, 2005, c. 136, art. 14, § 21, 2005 Minn. Laws 1102 (repealing § 624.04).

151. MINN. R. CIV. P. 4.02; Meldahl & SJM Props., Inc. v. McIntosh, No. 1050923509, slip op. at 12–14 (Minn. Dist. Ct. Feb. 23, 2006) (order on referee review) (finding improper service by maintenance person who was agent for landlord); Williams v. McGrimmon, No. UD-1991207535 (Minn. Dist. Ct. Dec. 17, 1999) (order dismissing action) (holding delivery of service personally by plaintiff to a person of suitable age and discretion who lived in Iowa and was only a temporary guest of the tenant was improper). In *Hedlund v. Potter*, the caretaker for the landlord served the tenant with the summons and complaint. No. C3-91-1542 (Minn. Dist. Ct. Dec. 31, 1991) (order dismissing unlawful detainer action). The caretaker had signed the lease and was authorized to sign leases, collect rent, maintain the premises, and receive service of process on behalf of the landlord under Minnesota Rule of Civil Procedure 4.03. *Id.* The court held that service was improper because the caretaker was an agent of plaintiff. *Id.* In *Lewis v. Contracting Northwest, Inc.*, the court explained the reason for precluding parties from serving process:

> The law has wisely entrusted the decision of disputes between citizens to persons wholly disinterested and free from bias and the acrimony of

Substituted service on non-defendant defenses include: (1) the defendant could be found in the county,[152] (2) service on a person who does not reside with the defendant,[153] (3) service on a person who is not of suitable age and discretion,[154] and (4) service not at the defendant's residence.[155] Service on a business must be on a person authorized to accept service.[156]

Improper substitute service by mail and posting defenses include: (1) the defendant could be found in the county;[157] (2) personal service was not attempted twice on different days, with at least one attempt between 6:00 p.m. and 10:00 p.m.;[158] (3) the

> feeling so frequently, if not uniformly, engendered by litigation; and the same is equally true of the persons selected to execute the process necessary to the adjustment of such disputes.

413 N.W.2d 154, 155 (Minn. Ct. App. 1987).

152. Berryhill v. Healey, 89 Minn. 444, 445–47, 95 N.W. 314, 315–16 (1903); Durigan v. Smith, No. UD-80515 (Hennepin County Mun. Ct. July 25, 1977) (order vacating prior judgment of the court) (finding service improper because defendant was within the county).

153. Murray v. Murray, 159 Minn. 111, 112–15, 198 N.W. 307, 307–08 (1924). The status of a person being a resident is somewhere between something more permanent, as in a domicile, and something less permanent, as in a visitor. *See* O'Sell v. Peterson, 595 N.W.2d 870, 872–74 (Minn. Ct. App. 1999) (discussing cases in Minnesota and other jurisdictions while holding that service on defendant's fourteen-year-old stepson who stayed with defendant during regular and planned non-custodial visitation was service on a resident). *But see* Williams v. McGrimmon, No. UD-1991207535 (Minn. Dist. Ct. Dec. 17, 1999) (order dismissing unlawful detainer action because service by delivery to a person of suitable age and discretion who lived in Iowa and was only a temporary guest of the tenant was improper).

154. Minneapolis Pub. Hous. Auth. v. Kline, No. UD-1930712506 (Minn. Dist. Ct. Aug. 5, 1993) (order vacating default judgment) (granting motion to quash plaintiff's writ of restitution where service was on child who did not reside on the premises); Joiner v. Harris, No. UD-1930712506 (Minn. Dist. Ct. July 23, 1993) (order of dismissal) (dismissing plaintiff's action where service was on thirteen-year-old child who suffered from attention deficit disorder and did not identify the person receiving service).

155. Holtberg v. Bommersbach, 236 Minn. 335, 336–39, 52 N.W.2d 766, 768–69 (1952).

156. Tri Star Developers, LLC v. REDACTED, No. HC-010109514 (Minn. Dist. Ct. Oct. 17, 2001) (order vacating default judgment) (dismissing and expunging action because of improper service on employee of business who was not an officer and not authorized to accept service).

157. *Berryhill*, 89 Minn. at 445–47, 95 N.W. at 315–16.

158. MINN. STAT. § 504B.331(d)(1)(ii) (2008) (formerly codified at MINN. STAT. § 566.06 (1998)); Project for Pride in Living, Inc. v. REDACTED, No. HC-010815515 (Minn. Dist. Ct. Aug. 29, 2001) (order dismissing plaintiff's action with prejudice and granting defendant costs) (finding mailing and posting service improper where there was no attempt at personal service between 6:00 p.m. and 10:00 p.m.).

summons was mailed but not posted, or posted but not mailed;[159] and (4) the plaintiff posted the summons before mailing the summons and filing the affidavit of mailing, rather than mailing the summons, filing the affidavit, and then posting the summons.[160]

The landlord may bring the action jointly against the tenant and subtenant.[161] However, if the subtenant is not named as a party in an action against the tenant, the writ cannot be enforced against the subtenant.[162]

Often, tenants have other defenses in addition to the defense of improper service. If a defendant does not move the court for dismissal based on lack of personal jurisdiction before or contemporaneously with a motion for dismissal on other grounds or partial summary judgment, the defendant invokes the jurisdiction of the district court and waives by implication the defense of lack of personal jurisdiction.[163]

It is unclear whether defendants can be designated as "John Doe" or "Jane Doe." The summons must be directed to "stat[e] the full name and date of birth of the person against whom the complaint is made, unless it is not known . . . ."[164] The eviction statutes do not contain authority for commencement of an action against an unknown defendant by use of a fictitious name.[165] While Minnesota Rule of Civil Procedure 9.08 provides for designating the unknown name of an opposing party with any name, it also contemplates amendment of the pleadings with the true name of the party.[166] It appears that Rule 9.08 contemplates an action of longer duration, which would allow for identification of the true

159. Hartog v. Ketchum, No. C4-94-796 (Minn. Dist. Ct. July 25, 1994) (order granting motion to dismiss) (finding that summons was posted but not mailed).

160. Minneapolis Pub. Hous. Auth. v. McKinley, No. UD-1980305507 (Minn. Dist. Ct. Mar. 27, 1998) (order denying plaintiff's motion for unlawful detainer action) (posting of summons before mailing of summons did not comply with statute and rule, thus requiring dismissal).

161. Judd v. Arnold, 31 Minn. 430, 433, 18 N.W. 151, 152 (1884).

162. Bagley v. Sternberg, 34 Minn. 470, 471–72, 26 N.W. 602, 602–03 (1886); Kowalenko v. Haines, No. C6-85-1365, slip op. at 2 (Minn. Ct. App. July 24, 1985) (order).

163. Patterson v. Wu Family Corp., 608 N.W.2d 863, 868–69 (Minn. 2000).

164. MINN. STAT. § 504B.321, subdiv. 1 (2008) (formerly codified at MINN. STAT. § 566.05 (1998)).

165. *Compare* MINN. STAT. §§ 504B.281–.471 (2008) (eviction statutes), *with* MINN. STAT. § 558.02 (2008) (partition of real estate), *and* MINN. STAT. § 559.02 (2008) (adverse claims to real estate).

166. MINN. R. CIV. P. 9.08. *See also* Peterson v. Sorlien, 299 N.W.2d 123, 132 (Minn. 1980); Leaon v. Washington County, 397 N.W.2d 867, 871 (Minn. 1986).

names of the defendants.

The writ of recovery should not be enforced against unnamed occupants. It cannot be enforced against a person who was not a party to the eviction action nor named in the writ of restitution.[167] If the sheriff cannot determine whether the designation of "John Doe" or "Jane Doe" includes the person in the premises, the sheriff should not enforce the writ.[168] Given the uncertainty of application of Rule 9.08 and the problems in enforcing a "John Doe" or "Jane Doe" writ, the prudent landlord should avoid such designation and discover the names of tenants prior to commencing an eviction action.

A defendant not specifically named in an eviction action faces a dilemma about challenging how the case has been pled. While the tenant may have grounds for reopening the action and vacating the judgment based on a lack of personal jurisdiction, the landlord may simply re-file another action pleading the name of the tenant. If a tenant does not have any other defenses to the action, the tenant simply will have bought more time to move by forcing the landlord to file an eviction action that will become part of the tenant's record with the tenant screening company, making it more difficult to move. In addition, if the case name remains "John or Jane Doe," the tenant screening agencies may not be able to connect the case to the tenant. Depending on other defenses available to the tenant, the tenant may be better served by raising the issue with the landlord and negotiating for more time to move and for a positive or neutral tenant reference, thus avoiding a court file, which creates an unfavorable tenant screening report.[169]

C. Failure of the Plaintiff to Satisfy Preconditions to Recovery of the Property

1. Entitlement to Possession

The plaintiff must prove entitlement to recovery of the

167. *See Kowalenko*, C6-85-1365, slip op. at *2. In *Kowalenko*, the petitioner had subleased the apartment from the former tenants. *Id.* The writ was enforced against the petitioner, pursuant to an unlawful detainer action against former tenants, but not the petitioner. *Id.* The petitioner was not named in the writ. *Id.* The court ordered the landlord to return possession of the apartment and petitioner's personal property to her pursuant to Minnesota Statutes section 504B.375 (2008) (formerly codified at section 566.175 (1998)). *Id.*

168. *See* Casper v. Klippen, 61 Minn. 353, 356, 63 N.W. 737, 739 (1895).

169. *See infra* notes 588–612 and accompanying text.

property.[170] The action may be commenced only by the person entitled to the premises,[171] or the authorized management company or agent for the owner of the premises.[172] Housing court rules also provide that the action shall be brought in the name of the owner of the property or other person entitled to possession of the premises, no agent shall sue in the agent's own name, and agents must be authorized to represent the principal.[173] One joint tenant can evict a lessee from co-owned property without the other joint tenant's consent.[174] A power of authority signed by a person other than the principal must be notarized.[175]

2. Landlord Disclosure of Address

The landlord cannot maintain an eviction action if the names and addresses of the authorized manager of the premises and the owner or agent authorized to accept service are not disclosed as required by the statute, and such information is not known by the tenant at least thirty days before the issuance of the summons.[176]

170. *See, e.g.*, Grandco Mgmt. v. Wielding, No. UD-1921202525 (Minn. Dist. Ct. Dec. 16, 1993) (decision and order) (finding that a landlord who files for bankruptcy, listing the premises as part of the bankruptcy estate, relinquishes control of the premises to the bankruptcy court and does not have the right to file an eviction action until the bankruptcy court abandons the property). In *Mattice v. Judge*, the plaintiff had signed a purchase agreement for real property and since there had been no closing on the purchase agreement, the seller had not yet conveyed a deed to the plaintiff and the purchase agreement did not otherwise entitle the plaintiff to possession of the property prior to closing on the purchase agreement. No. UD-1990504519 (Minn. Dist. Ct. May 19, 1999) (order granting motion to dismiss).

171. MINN. STAT. § 504B.285, subdiv. 1 (2008) (formerly codified at MINN. STAT. § 566.03 (1998)).

172. *Id.* § 481.02, subdiv. 3(13); Johnson v. Robertson, No. UD-193072254 (Minn. Dist. Ct. Aug. 4, 1993) (order dismissing action) (finding that plaintiff's agent appeared without written authorization).

173. MINN. GEN. R. PRAC. 603 (2008); Meldahl & SJM Props., Inc. v. McIntosh, No. 1050923509, slip op. at 18–19 (Minn. Dist. Ct. Feb. 23, 2006) (order on referee review) (dismissing eviction where agent was not authorized by principal).

174. Abraham v. Bellefy, No. A03-585, 2004 WL 193127 (Minn. Ct. App. Feb. 3, 2004).

175. MINN. STAT. § 523.01 (2008); Minneapolis Pub. Hous. Auth. v. Redding, No. UD-1930222507 (Minn. Dist. Ct. Mar. 5, 1993) (order).

176. *See* MINN. STAT. § 504B.181 (2008) (formerly codified at MINN. STAT. § 504.22 (1998)); Sakala v. Adams, No. 27-CV-HC-08-6156 (Minn. Dist. Ct. Sept. 9, 2008) (order reversing referee order for eviction and dismissing eviction action) (dismissing action for landlord's failure to post address until two weeks after filing eviction action); Haage v. Strong, No. UD-1911206527 (Minn. Dist. Ct. Dec. 20, 1991) (order dismissing unlawful detainer action) (dismissing claim for landlord's

The landlord also must plead compliance with the statute.[177] A post office box does not comply with the statute since it is not an address and not a place where the plaintiff can be personally served.[178] Similarly, the landlord's use of a commercial mailbox service, while appearing to be a street address, is not a proper address because the landlord could not be personally served there.[179] Some local ordinances require a landlord who does not live in the local area to maintain a contact person who resides in the area.[180] Failure to comply with such ordinances may be a violation of section 504B.181.[181]

3. Trade Name Registration

Persons conducting a business under an assumed trade name must register the name with and disclose the name of the principals to the Minnesota Secretary of State. An assumed name is a name that does not set forth the true name of every person interested in the business.[182] The terms "person" and "true name" are broadly defined.[183] A person conducting a business in violation of the statutes may not commence or defend against a civil action based upon contracts or transactions of the business before a certificate has been filed. All proceedings must be stayed until the

failure to give oral or written notice of his address).

177. *See* Henze v. Bronzin (Minn. Dist. Ct. June 4, 1991) (order granting defendant's motion to dismiss) (action dismissed due to plaintiff's failure to plead compliance with Minnesota Statutes section 504.22 (1999) (currently codified at section 504B.181 (2008)).

178. *See* Franklin v. Bryd, No. HC-000103511 (Minn. Dist. Ct. Jan. 13, 2000) (order granting motion to dismiss).

179. Towns v. Dailey, No. UD-01970912521 (Minn. Dist. Ct. Oct. 13, 1997) (order dismissing unlawful detainer action); Smith v. Reese, No. UD-1961203542 (Minn. Dist. Ct. Jan. 3, 1997) (order dismissing unlawful detainer action) (holding that a box at a private commercial mail collection/distribution center is not an address where plaintiffs could be personally served, since it is a violation of section 504.22 (1992)).

180. *See* MINNEAPOLIS, MINN., CODE § 244.1840 (2009) (within sixteen-county metropolitan area); BROOKLYN CTR., MINN., CODE § 12-904 (2009) (within seven-county metropolitan area).

181. Anda Constr. v. Peoples, No. UD-01970321516 (Minn. Dist. Ct. Apr. 2, 1997) (order dismissing unlawful detainer action) (stating that violation of local contact ordinance violates section 504.22 (1999)). *See also* City of Minneapolis v. Swanson, No. C5-97-312, 1997 WL 471182 (Minn. Ct. App. Aug. 19, 1997) (finding that ordinance requiring landlord to list residential address rather than post office box on rental license is constitutional).

182. MINN. STAT. § 333.01 (2008).

183. *Id.*, subdivs. 2–3.

certificate is filed. If the opposing party prevails in the action, the opposing party shall also be entitled to tax $250 in costs, in addition to other statutory costs. If the opposing party does not prevail in the action, the opposing party is entitled to deduct $250 from the judgment otherwise recoverable.[184]

A foreign corporation that transacts business in Minnesota must hold a certificate of authority from the Secretary of State.[185] A foreign corporation may not sue in Minnesota courts without obtaining the certificate.[186]

4. Failure to State the Facts that Authorize Recovery of the Premises

The plaintiff must plead in the complaint "the facts which authorize the recovery of possession."[187] The complaint must set forth a legally sufficient claim for relief.[188] The statute appears to require more than mere notice pleading used in other civil actions.[189] This is consistent with the summary nature of eviction actions, where the defendant has little time to prepare a defense and possibly no opportunity for discovery. Pleading "the facts which authorize recovery" of the premises should require more than mere conclusory statements. For example, rather than state

184. *Id.* § 333.06; Solar IV P'ship v. Sederstrom, No. UD-1980812534 (Minn. Dist. Ct. Sept. 3, 1998) (order awarding relief) (awarding $250 in costs where plaintiff registered its trade name but operated under another non-registered trade name); Cent. Manor Apartments v. Beckman, Nos. UD-1980609509, UD-1980513525 (Minn. Dist. Ct. Aug. 6, 1998) (order denying claim for relief) (awarding tenant a setoff of $500 where landlord commenced two successive unlawful detainer actions without registering its trade name).

185. MINN. STAT. § 303.03 (2008).

186. *Id.* § 303.20; Uptown Classic Props. JV1, LLC v. REDACTED, No. HC-1030123529 (Minn. Dist. Ct. Apr. 9, 2003) (order to expunge) (dismissing and expunging where foreign limited liability company had no state certificate of authority under section 322B.94); Cohn-Hall-Marx Co. v. Feinberg, 214 Minn. 584, 588, 8 N.W.2d 825, 826–27 (1943); E.C. Bogt, Inc. v. Ganley Bros. Co., 185 Minn. 442, 443–44, 242 N.W. 338, 338–39 (1932).

187. MINN. STAT. § 504B.321, subdiv. 1(a) (2008) (formerly codified at MINN. STAT. § 566.05 (1998)); MINN. GEN. R. PRAC. 604(a)(4) (2008); *see also* Mac-Du Props. v. LaBresh, 392 N.W.2d 315, 317 (Minn. Ct. App. 1986) (citing the requirements for a complaint in an eviction action).

188. *See generally* Mankato & Blue Earth County Hous. & Redevelopment Auth. v. Critzer, No. C2-94-1712 (Minn. Ct. App. Mar. 28, 1995) (order affirming the trial court's decision) (affirming the lower court's decision and stating that "[t]he complaint makes a legally sufficient claim").

189. *Compare* § 504B.321, subdiv. 1(a), *with* MINN. R. CIV. P. 8.01 (Rule 8.01 states that "[a] pleading . . . shall contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought").

that the tenant breached the lease, the complaint should specifically allege the facts that lead to the conclusion of breach of the lease.[190]

5. Unauthorized Practice of Law

While it is generally unlawful for a person who is not an attorney to represent others in court, an authorized management company or agent may commence and conduct the action in its own name or on behalf of the owner of the property.[191] The tenant or landlord may be represented by a person who is not a licensed attorney.[192] However, except for a nonprofit corporation, a person who is not a licensed attorney may not charge or collect a separate fee for services in representing a party.[193] Some for-profit businesses represent plaintiffs in actions and charge a separate fee for such representation. In those cases, the defendant should move to dismiss the action.[194] An attorney must represent corporations, limited partnerships, and limited liability companies.[195]

190. *See* Mei Jen Chen v. REDACTED, No. HC-040106505 (Minn. Dist. Ct. Jan. 13, 2004) (decision and order) (striking nonpayment of rent claim as vague; notice claim and retaliation defense scheduled for trial); Brogdon Props., L.L.C. v. REDACTED, No. 030826501 (Minn. Dist. Ct. Sept. 4, 2003) (decision and order) (dismissing for lack of specific allegations of illegal activity).

191. MINN. STAT. § 481.02, subdivs. 1, 3(12) (2008).

192. *Id.*, subdiv. 3(13). *See also* Letter from Honorable Thomas F. Haeg, 4th District Housing Court Referee, to Sherry Coates (July 13, 1994) (on file with author).

193. § 481.02, subdiv. 3(13).

194. *In re* Admin. of Hous. Court Div., C4-90-11340 (Minn. Dist. Ct. June 9, 1995) (order mandating cease and desist from unlawful detainer actions) (holding person and company that admitted that a non-attorney, non-managing agent collected fees for filing and maintaining unlawful detainer actions were prohibited from filing and maintaining such actions).

195. Nicollet Restoration, Inc. v. Turnham, 486 N.W.2d 753, 756 (Minn. 1992) (stating that a corporation must be represented by an attorney); *see also* World Championship Fighting, Inc. v. Janos, 609 N.W.2d. 263, 265 (Minn. Ct. App. 2000) (filing of notice of removal from conciliation court by a corporation was an appearance under Minnesota Rule of Civil Procedure 5.01 and could not be done without counsel); Towers v. Schwan, No. A07-1311, 2008 WL 4224462, at *1–2 (Minn. Ct. App. Sept. 16, 2008) (reserving judgment for landlord but expressing no opinion on whether Minnesota General Rule of Practice 603, which allows agents to represent principals with a power of authority, is inconsistent with Minnesota Statutes section 481.02).

The Second District (Ramsey County) and the Fourth District (Hennepin County) have issued standing orders on corporations not represented by attorneys. *See* Memorandum from Chief Judge Lawrence Cohen of the Minnesota

6. Failure to Follow Hennepin and Ramsey County Housing Court Rules

Housing court rules provide that in an action for holding over after termination of the lease, the plaintiff must attach a copy of the termination notice, if any, to the complaint or provide it to the defendant or defendant's counsel at the initial appearance unless the plaintiff does not possess a copy of the notice or if the defendant acknowledges receipt of the notice at the hearing. Similarly, if the action is for breach of the lease, the plaintiff must attach a copy of the lease, if any, to the complaint or provide it to the defendant or defendant's counsel at the initial appearance unless the plaintiff does not possess a copy of it.[196] Failure to comply can result in dismissal.[197] The plaintiff must also file the affidavit of service by 3:00 p.m. three business days before the hearing or the matter may be stricken.[198]

District Court, Second Judicial District to the Clerk of the St. Paul Housing Court (Mar. 30, 2001) (on file with author) (stating that "a licensed attorney must represent any corporation appearing in Housing Court of the Second Judicial District"); *In re* Morning Sun Invs., Inc. (Minn. Dist. Ct. Mar. 21, 2002) (stating that a corporation must be represented by a licensed attorney when appearing in district court).

Minnesota's district courts commonly dismiss eviction actions commenced by corporations when not represented by an attorney. *See* Meldahl & SJM Props., Inc. v. McIntosh, No. 1050923509 (Minn. Dist. Ct. Feb. 23, 2006) (order on referee review) (stating that the corporation cannot be represented by a non-attorney agent such as its president); Westfalls Hous. Ltd. P'ship v. Scheer, No. C8-93-227 (Minn. Dist. Ct. Nov. 30, 1993) (order) (stating that a limited partnership cannot be represented by a non-attorney agent such as its vice president); Remas Props., LLC v. Student, No. UD-1940705517 (Minn. Dist. Ct. July 19, 1994) (decision and order) (dismissing the case when the limited liability company was represented by a non-attorney).

196. MINN. GEN. R. PRAC. 604(d) (2008).

197. *See* Pham v. REDACTED, No. HC-030131517 (Minn. Dist. Ct. Feb. 13, 2003) (decision and order) (dismissing case for failure to present lease for breach claim and notice for holdover claim, and for waiver of notice by acceptance of rent); B&J Prop. Mgmt. v. Gates, No. UD-01970602519 (Minn. Dist. Ct. June 12, 1997) (order granting motion to dismiss) (dismissing for improper service, failure to register trade name, and failure to attach notice to quit and lease to complaint).

198. MINN. GEN. R. PRAC. 605 (2008); Oloiye v. Washington, No. UD-01990708534 (Minn. Dist. Ct. July 22, 1999) (order granting motion to dismiss) (dismissing claim for failure to file an affidavit of service resulting in the grant of an expungement motion and the award of tenant costs).

7. Failure to Provide Defendant with a Copy of the Lease Before Commencement of the Action

The landlord must provide a copy of the lease to the tenant.[199] In actions to enforce a written lease, except for nonpayment of rent, disturbing the peace, malicious destruction of property, or violation of the state drug covenant, failure to provide a copy of the lease is a defense.[200] A signed acknowledgment by the tenant of receipt is prima facie evidence of receipt.[201] The landlord may overcome the defense by establishing that the tenant had actual knowledge of the provision.[202] Some local ordinances also require the landlord to give the tenant a copy of the lease.[203]

8. Section 8 Voucher Program: Failure to Give Notice to the Public Housing Authority

Under the Section 8 voucher program, "[t]he owner must give the [housing authority] a copy of any owner eviction notice to the tenant."[204] If the owner fails to give such notice to the housing authority, the action must be dismissed.[205]

9. Bankruptcy

A landlord may not use an eviction action to terminate the interest in a lease to property of a tenant who filed a bankruptcy action, without first obtaining relief from the automatic stay.[206] A

199. MINN. STAT. § 504B.115 (2008) (formerly codified at MINN. STAT. § 504.015 (1998)).

200. *Id.*, subdiv. 2.

201. *Id.*, subdiv. 1.

202. *Id.*, subdiv. 2; Meldahl & SJM Props., Inc. v. McIntosh, No. 1050923509 (Minn. Dist. Ct. Feb. 23, 2006) (order on referee review) (dismissing breach of lease claim in eviction case claiming breach of lease and nonpayment of rent).

203. *See, e.g.*, MINNEAPOLIS, MINN., CODE § 244.280 (2009) (requiring landlords to give their tenants a copy of the lease within five days after it has been signed by both parties).

204. 24 C.F.R. § 982.310(e)(2)(ii) (2008). Additionally, the "[o]wner eviction notice means notice to vacate, or a complaint or other initial pleading used under state or local law to commence an eviction action." *Id.* § 982.310(e)(2)(i). *See also supra* notes 100–102 and accompanying text (discussing the program).

205. *Meldahl*, No. 1050923509 (dismissing eviction in part for plaintiff's failure to give notice to public housing authority); Rio Hot Props., Inc. v. REDACTED, No. HC-021024517 (Minn. Dist. Ct. Nov. 7, 2002) (decision and order) (dismissing a case where a Section 8 landlord did not notify the housing authority of the eviction action at the same time it notified the tenant, even though the landlord notified the housing authority afterwards).

206. Otten v. Washington, No. UD-1910617506 (Minn. Dist. Ct. July 3, 1991)

landlord who files bankruptcy listing the premises as part of the bankruptcy estate, relinquishes control of the premises to the bankruptcy court and does not have the right to file an eviction action until the bankruptcy court abandons the property.[207]

10. Action or Claim Is Premature

When the complaint alleges an act that has not yet occurred, such as nonpayment of future rent or fees, or failing to move at expiration of a notice period that has not yet expired, the action or claim should be dismissed as being premature or unripe. The court should consider only present possessory interests of the parties.[208]

11. Pending Parallel Litigation

In some cases, a landlord may file an eviction action as a way to get around defending an action already brought by the tenant. The court may dismiss or stay the action as being incorrectly commenced when the pending parallel action would properly resolve the dispute. In *Rice Park Properties v. Robins, Kaplan, Miller & Ciresi*, the Minnesota Supreme Court reversed the court of appeals and affirmed the district court decision to stay an unlawful detainer action pending final disposition of a related and earlier filed declaratory judgment action commenced by the tenant.[209]

(order granting motion to stay) (dismissing complaint alleging nonpayment of rent for period following bankruptcy filing); *see* 11 U.S.C. §§ 362, 541 (2006).

207. *See* Grandco Mgmt. v. Wielding, No. UD-1921202525 (Minn. Dist. Ct. Dec. 16, 1993) (decision and order) (holding that petitioner, whose property was currently under the direction of the trustee of bankruptcy, would not have standing to bring an unlawful detainer action until abandonment by the trustee in bankruptcy).

208. *See* Eagan E. Ltd. P'ship v. Powers Investigations, Inc., 554 N.W.2d 621, 622 (Minn. Ct. App. 1996) (finding that the trial court's jurisdiction was limited to determining present possessory rights of the parties and that the trial court exceeded its jurisdiction by ruling on prospective rent increase and attorney's fee issues); Walters v. Demmings, No. UD-1990916517 (Minn. Dist. Ct. Nov. 15, 1999) (order rescheduling compliance hearing) (dismissing landlord's notice to quit claim as premature, as the action was filed before the effective date of the notice).

209. 532 N.W.2d 556 (Minn. 1995). *See* Stein v. J.D. White, Inc., No. CO-91-2164, FIN. & COM. (Minneapolis, Minn.), Apr. 24, 1992, at B24 (Minn. Ct. App. Apr. 21, 1992) (order affirming lower court's decision) (affirmed eviction dismissal). *See also supra* notes 137–39 and accompanying text (discussing stay of eviction action to allow defendant to commence illegal foreclosure conveyance action).

12. Servicemembers Civil Relief Act

On December 19, 2003, the new Servicemembers Civil Relief Act replaced the Soldiers' and Sailors' Civil Relief Act.[210] The Act extended coverage to members of the National Guard serving more than thirty consecutive days of active duty.[211] Absent a court order, a landlord may not evict a servicemember or the dependents of a servicemember during a period of military service from a residential lease when the monthly rent is at or below $2,400 per month for the year of 2003, and $2,465 in 2004, with a formula to calculate the rent ceiling for subsequent years.[212] In any eviction case, if a servicemember whose ability to pay the rent is materially affected by military service, the court shall (1) grant a request for a stay of the action for ninety days, unless equity requires a shorter or longer stay, or (2) adjust the obligation under the lease to preserve the interests of all parties.[213] The court may also grant the relief on its own motion and find against the landlord as equity may require.[214] It is a misdemeanor for a landlord to knowingly take part in an eviction of a servicemember or his dependents or knowingly attempt to do so.[215]

13. Other Precondition Defenses

On occasion, courts have found landlords fraudulently filing and prosecuting eviction and other actions in violation of state consumer protection laws and have ordered the landlords to obtain judge approval before filing new actions.[216] The action can be dismissed for failing to include a necessary party.[217] The state

210. Servicemembers Civil Relief Act, Pub. L. No. 108-189, 117 Stat. 2835 (2003) (codified at 50 U.S.C. app. §§ 501–594 (2006)).

211. *Id.* at 2837 (codified at 50 U.S.C. app. § 511 (2)(a)(ii)).

212. 50 U.S.C. app. § 351(a)(1).

213. *Id.* § 351(b)(1).

214. *Id.* § 351(b)(2).

215. *Id.* § 351(c)(1).

216. *See* Love v. Amsler, 441 N.W.2d 555, 557–60, *aff'g*, No. 87-14719 (Minn. Dist. Ct. July 14, 1988) (affirming trial court order awarding complete rent abatement for uninhabitable apartment); Amsler v. Touliot, No. UD-1970908519 (Minn. Dist. Ct. Sept. 24, 1997) (decision and order) (ordering landlord to obtain judge approval when his wife files cases on properties in which he maintains an interest).

217. In *Hansen v. Trom*, the landlord alleged nonpayment of rent against one co-tenant, without naming the other co-tenant. No. UD-1950926503 (Minn. Dist. Ct. Nov. 3, 1995) (decision and order). The court held that the landlord failed to name an indispensable party, since the court could not enter final judgment

courts do not have jurisdiction over claims involving the right of an enrolled member of an Indian tribe to possession of property held in trust for Indians by the United States.[218] An eviction can be dismissed as being an inappropriate method to resolve complex claims.[219] Since the eviction action is for allegedly unlawful detention or possession of the property, the case is moot if the tenant has vacated the property prior to the court hearing.[220]

D. Nonpayment of Rent Defenses

1. Breach of the Covenants of Habitability

Implied in every oral and written residential lease are three covenants or obligations of the landlord: (1) that the premises and all common areas are fit for the use intended by the parties; (2) to keep the premises in reasonable repair, except where the disrepair was caused by the willful, malicious, or irresponsible conduct of the tenant or tenant's agent; and (3) to maintain the premises in compliance with applicable state and local housing maintenance, health, and safety laws, except where the violation was caused by the willful, malicious, or irresponsible conduct of the tenant or tenant's agent.[221] The statute is to be liberally construed.[222] The covenants of habitability and the covenant to pay rent are mutual and dependant,[223] and all or part of the rent is not due when the

without affecting the interests of the co-tenant. *Id.* at *5.

218. White Earth Hous. & Redevelopment Auth. v. J.F., No. C8-91-224 (Minn. Dist. Ct. Feb. 5, 1992) (order); All Mission Indian Hous. Auth. v. Silvas, 680 F. Supp. 330 (C.D. Cal. 1987); 28 U.S.C. § 1360(b) (2006).

219. *See supra* Part II(E) (discussing Shustarich v. Fowler, UD-1960604520 (Minn. Dist. Ct. July 5, 1996) (decision and order)).

220. Olson v. REDACTED, No. HC-031008504 (Minn. Dist. Ct. Oct. 21, 2003) (decision and order) (dismissing where tenant vacated before hearing but after action commenced); Ukatu v. REDACTED, No. HC-0307614501 (Minn. Dist. Ct. July 30, 2003) (order dismissing plaintiff's eviction action) (finding that the eviction case was moot when tenants had vacated).

221. MINN. STAT. § 504B.161, subdiv. 1(a) (2008) (formerly codified at MINN. STAT. § 504.18 (1998)). Included in "health and safety laws" are the weather-stripping, caulking, storm window, and storm door energy efficiency standards for rental property, and fire extinguisher and smoke detector installation requirements. *Id.* § 299F.362. The authority of municipalities to enact and enforce habitability standards for rental housing is constrained by the prohibition on municipal regulation of building code provisions. *Id.* § 326B.121, subdiv. 1 (formerly codified at § 16B.62, subdiv. 1 (2006)). *See supra* note 33 (discussing City of Morris v. Sax Invs., Inc., 749 N.W.2d 1, 3 (Minn. 2008)).

222. § 504B.161, subdiv. 3.

223. Fritz v. Warthen, 298 Minn. 54, 58, 213 N.W.2d 339, 341 (1973).

landlord breached the covenants. The defendant may raise breach of the covenants as a defense to an action for nonpayment of rent.[224]

The parties may not waive or modify the covenants.[225] While the tenant may agree in writing to perform special repairs or maintenance if the agreement is supported by adequate consideration, the agreement does not waive the covenants.[226] The tenant's pre-rental inspection of the premises does not defeat the covenants.[227] A lease term stating that the tenant accepts the premises as being in excellent condition is void and contrary to public policy, where the condition of the premises violates the covenants.[228] The landlord may not charge the tenant for service calls to maintain the property.[229]

The court may require the tenant to pay withheld rent into court pending a trial on the defense.[230] The court has discretion to consider the circumstances in determining whether the tenant must deposit rent with the court. If the tenant believes that the

224. *Id.* at 58–59, 213 N.W.2d at 341–42.

225. § 504B.161, subdiv. 1(b); Greevers v. Greevers, No. UD-1950628506 (Minn. Dist. Ct. July 24, 1995) (order rescheduling for compliance hearing) (finding that there was no existence of an agreement by the tenant to reside in condemnable or uninhabitable premises, and that such an agreement would be contrary to public policy and in violation of state law).

226. § 504B.161, subdivs. 1(b), 2.

227. *Id.*, subdiv. 3.

228. *Id.*, subdivs. 2–3. Adequate consideration to shift the obligation for repairs from the landlord to the tenant must be fair and reasonable under the circumstances. Coleman v. Kopet, No. UD-1000211534 (Minn. Dist. Ct. Mar. 8, 2000) (order granting judgment for defendants) (finding that the landlord failed to prove adequate consideration so the landlord was responsible for making all repairs, and rent abatement of $2,925 over ten months (32%) covered by rent paid into court and credits against future rent).

229. State v. Ellis, 441 N.W.2d 134, 138 (Minn. Ct. App. 1989) (finding that ultimate responsibility for compliance with the covenants remains with the landlord; landlord's attempt to transfer responsibility to tenant is prohibited); Meldahl & SJM Props., Inc. v. McIntosh, No. 1050923509, slip op. at 21–22 (order on referee review) (Minn. Dist. Ct. Feb. 23, 2006) (requiring payment of $50 service call fee per lease term was illegal and unenforceable).

230. *Fritz*, 298 Minn. at 61–62, 213 N.W.2d at 343 (holding that the trial court shall order defendant to provide security in one of three ways: (1) pay into court rent to be withheld and any future rent withheld, (2) deposit such rents in escrow subject to appropriate terms and conditions, or (3) provide adequate security if such is more suitable under the circumstances). The *Fritz* court based the need for payment of rent or security on its concern that plaintiff may need the rent to pay for expenses of the premises during the eviction action, and if plaintiff prevails, plaintiff would be harmed if the rent could not be collected and the action delayed eviction of defendant. *Id.*; *see* MINN. GEN. R. PRAC. 608 (2008).

amount ordered is too high, the tenant could consider appealing to the court of appeals for a writ of prohibition,[231] or if the decision was made by a housing court referee, requesting judge review of the decision.[232] Where the premises have been condemned or are in condemnable condition, the defendant should be allowed to move for summary judgment without prepayment of back rent since the premises had no monetary value.[233] In some cases, the court will accept a guarantee of payment of rent by an agency in lieu of payment of rent into court.[234] Generally, if the court orders the tenant to pay rent into court and the tenant does not, the court will allow the landlord to order a writ of restitution.[235]

The defendant has the burden of proving a violation of the covenants. Useful evidence includes reports and/or testimony of housing, health, fire, and energy inspectors; pictures; items from the premises; utilities and other bills; and lay witnesses.[236] Tenants

231. See *infra* Part VI.

232. *See* Grandco Mgmt. v. Moore, No. UD-1920727536 (Minn. Dist. Ct. Aug. 15, 1992) (decision and order) (order vacating portion of previous order). In *Grandco*, the referee ordered the tenant to deposit withheld rent into court, allowing a writ of restitution to issue by default if she did not. The tenant requested judge review of the order. *Id.* The court concluded that the tenant's affidavit and exhibits demonstrated the substantial likelihood of success on the merits of her defense under the covenants of habitability, the tenant was without funds and unable to make the payment ordered by the referee, and the tenant's lack of funds was in part a direct result of the flood of other circumstances which gave rise to her defense. *Id.* The court concluded that no deposit was appropriate as security for the landlord and ordered that the referee's order be vacated regarding the deposit with the court. *Id.*

233. Brown v. Austin, No. UD-1000203527 (Minn. Dist. Ct. Feb. 17, 2000) (order denying defendant's motion to dismiss) (stating that since the tenant's habitability defense was based on a notice of intent to condemn the property, the court would not require the tenants to deposit any rent into court).

234. Larson v. Bonacci, No. UD-1970506542 (Minn. Dist. Ct. June 19, 1997) (decision and order granting rent abatement) (involving guarantee of payment from Economic Assistance Department); Hemraj v. Hicks, No. UD-1970306508 (Minn. Dist. Ct. Apr. 8, 1997) (decision and order granting judgment for plaintiff) (accepting agency guarantee of payment of the remainder by April 10 where trial was scheduled for March 28 and tenant paid half of rent into court).

235. Swartwood v. Rouleau, No. C8-98-1691, 1999 WL 293898 (Minn. Ct. App. May 11, 1999) (decision and order) (affirming order for eviction for nonpayment of rent where tenants claimed habitability violations but did not pay rent into court). *But see* Amsler v. Wilson, No. 27-CV-HC-09-37 (Minn. Dist. Ct. Jan 16, 2009) (decision and order reversing referee order for eviction) (finding that the tenant showed good cause for paying rent into court late, where the tenant was unable to convert money orders into cash before the court's deadline).

236. Tenants and other lay witnesses have the right to testify about their observations of habitability problems. In *Stewart v. Anderson*, the landlord filed a combination eviction action and conciliation court action in housing court, and

often submit inspection reports in habitability cases. While such documents probably comply with the public records exception to the hearsay rule, they still must be authenticated or be self-authenticating.[237] The tenant need not prove notice to the landlord of violations of the covenants.[238] It is not common for courts to take a first-hand view of the property. The district court may inspect the property, as long as it does not gather its own evidence.[239]

Neither the covenants of habitability nor the Minnesota appellate courts have clearly stated what standard should be used to measure damages for violation of the covenants of habitability. The "percentage reduction in the use and enjoyment" formula is most appropriate. Under this formula, the rent is abated by a percentage amount equal to the percentage reduction in the use and enjoyment that the trier of fact determines to have been caused by the defects. "Because of the cost and impracticability of using expert testimony to establish rental value in a habitability case, [the percentage reduction formula measure] appears to be the one most commonly adopted in cases which have actually set

the tenant answered alleging habitability. No. A06-1878, 2007 WL 2366528, at *1 (Minn. Ct. App. Aug. 21, 2007). At trial, the tenant attempted to testify about her observations about how her dryer worked and rodent infestation. *Id.* The housing court referee did not accept her testimony, since she was not an expert in dryer repair or pest control. *Id.* After the referee ruled for the landlord, the tenant sought review by a district court judge. *Id.* The district court reversed the referee's decision and awarded rent abatement, finding that the referee erred by requiring expert testimony for lay testimony. *Id.* at *2. On appeal, the court of appeals held that the district court correctly found that the referee had erred. *Id.* at *3.

237. MINN. R. EVID. 803(8), 901–902; *see also* State v. Northway, 588 N.W.2d 180 (Minn. Ct. App. 1999) (affirming trial court exclusion of federal report which was not authenticated).

238. Meldahl & SJM Props., Inc. v. McIntosh, No. 1050923509, slip op. at 21–22 (Minn. Dist. Ct. Feb. 23, 2006) (order on referee review) (finding that tenant need not give written notice to the landlord of violations of covenants of habitability, regardless of provisions in the written lease). The requirement for tenant remedies and rent escrow actions that the landlord receives notice of repair problems either from a tenant or a housing inspector does not apply to eviction actions. Larson v. Bonacci, No. UD-1970506542, slip op. at 5 (Minn. Dist. Ct. June 18, 1997) (decision and order granting rent abatement); *see* MINN. STAT. § 504B.385 (2008) (formerly codified at MINN. STAT. § 566.34 (1998)) (rent escrow action); *id.* § 504B.395 (formerly codified at § 566.19 (1998)) (tenant remedies action).

239. Scroggins v. Solchaga, 552 N.W.2d 248, 252 (Minn. Ct. App. 1996) (citing MT Props., Inc. v. CMC Real Estate Corp., 481 N.W.2d 383, 390 (Minn. Ct. App. 1992)).

damages."[240] The Tenants' Remedies Act incorporates this standard by authorizing the court to "find the extent to which any uncorrected violations impair the residential tenants' use and enjoyment of the property contracted for and order the rent abated accordingly."[241] Minnesota trial courts have generally applied the reduced use and enjoyment standard in summary proceedings such as eviction actions.[242] Where the premises are condemned as uninhabitable or are condemnable, the present value is zero and no rent is due to the landlord.[243] Unfortunately, it is not uncommon for the court to place an arbitrary limit on how far back in time the tenant can seek rent abatement.[244] Some courts have chosen not to limit retroactive rent abatement.[245] The only limitation on the rent abatement claim should be the six-year

240. ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 3:25 (1980 & Supp. 2008).

241. MINN. STAT. § 504B.425(e) (2008) (formerly codified at MINN. STAT. § 566.25 (1998)).

242. Khan v. Greene, No. UD-1940330506, slip op. at 5 (Minn. Dist. Ct. May 25, 1994) (decision and order dismissing unlawful detainer action); Z & S Mgmt. Co. v. Jankowicz, No. UD-1920219515, slip op. at 10 (Minn. Dist. Ct. Mar. 24, 1992) (decision and order dismissing action) (entitling defendant to an abatement in rent for decreased use and enjoyment of property caused by plaintiff's failure to remove peeling lead paint in a timely manner); Zeman v. Arnold, No. UD-1900911501 (Minn. Dist. Ct. Oct. 11, 1990) (decision and order denying plaintiff's unlawful detainer defense).

243. Love v. Amsler, 441 N.W.2d 555, *aff'g*, No. 87-14719 (Minn. Dist. Ct. July 14, 1988) (affirming order awarding complete rent abatement for uninhabitable apartment); Zeman v. Smith, Nos. UD-1840504512, UD-1840605520, slip op. at 5–6 (Minn. Dist. Ct. July 11, 1984) (findings of fact, conclusions of law, and order for judgment granting unlawful detainer action for defendant) (finding that tenant owes no rent for period prior to condemnation where premises were in condemnable condition); Hamre v. Wu, No. 797483, slip op. at 7 (Minn. Dist. Ct. Jan. 27, 1983) (order reversing municipal court order) (involving three judge appellate panel). If a landlord, agent, or person acting under the landlord's direction or control rents out residential housing after the premises were condemned or declared unfit for human habitation, the landlord is liable to the tenant for actual damages and an amount equal to three times the amount of all money collected from the tenant, including rent and security deposits, after the date of condemnation or declaration, plus costs and attorney's fees. The provisions of the statute may not be waived. MINN. STAT. § 504B.204 (2008) (formerly codified at MINN. STAT. § 504.245 (1998)).

244. Larson v. Bonacci, No. UD-1970506542 (Minn. Dist. Ct. June 18, 1997) (order granting rent abatement) (finding that rent abatement claim was limited to current lease, going back five months).

245. *See* Larson v. Anderson, No. C9-96-416 (Minn. Dist. Ct. Nov. 8, 1996) (decision and order) (awarding rent abatement of $6,910 over five years for failing to repair discharge of raw sewage on the premises; landlord's notice to quit was in retaliation for tenant's complaint to health department).

statute of limitations for claims under a contract or statute.[246] Any shorter limitation on the claim requires the tenant to litigate similar issues in two separate cases.

Courts often award both retroactive rent abatement and prospective rent abatement until the landlord complies with the covenants, sometimes with a compliance hearing scheduled, and with other relief where appropriate.[247] Some courts have increased rent abatement over time when the landlord fails to comply with court orders.[248] Since the covenants of habitability are implied into all oral and written leases, a violation of the covenants of habitability may give rise to consequential damages. The tenant may recover such consequential damages if at the time of the making of the lease, the parties could have reasonably contemplated such damages would result from a breach.[249] Where the tenant litigates and prevails on the issue of habitability violations, the landlord should not be awarded costs.[250] If the landlord fails to comply with repair and rent abatement orders, the tenant can seek imposition of fines[251] or a finding of contempt.[252]

246. MINN. STAT. § 541.05 (2008).

247. Meldahl & SJM Props., Inc. v. McIntosh, No. 1050923509, slip op. at 28 (Minn. Dist. Ct. Feb. 23, 2006) (order on referee review) (stating that retroactive and prospective rent abatement beyond amounts abated by Section 8 voucher office to continue until Section 8 voucher office concludes repairs have been completed); Barger v. Behler, No. UD-1970106527, slip op. at 4 (Minn. Dist. Ct. Jan. 30, 1997) (decision and order granting rent abatement) (involving a current and prospective rent abatement where landlord was ordered to fully clean tenant's apartment and could not receive rent until after verification of cleaning).

248. Judge v. Rio Hot Props., Inc., No. UD-1981202903 (Minn. Dist. Ct. July 7, 1999) (decision and order dismissing unlawful detainer action) (stating that rent abatement to increase if repairs are not completed).

249. Poppen v. Wadleigh, 235 Minn. 400, 404–05, 51 N.W.2d 75, 78 (1952) (commercial lease lost profits); Force Bros. v. Gottwald, 149 Minn. 268, 273, 183 N.W. 356, 358–59 (1921) (lost profits); Romer v. Topel, 414 N.W.2d 787, 788 (Minn. Ct. App. 1987) (transportation and stabling of horses at another location following collapse of a barn); Leshoure v. O'Brian, No. UD-01000303900 (Minn. Dist. Ct. May 17, 2000) (awarding retroactive monthly rent abatement calculated as $300 out of $850 total rent (35%) for $3,600 over one year, and $250 in consequential damages for repair costs).

250. Lynch v. Hart, No. UD-1960610529 (Minn. Dist. Ct. June 27, 1996) (order granting rent abatement) (holding that tenants not assessed costs because they proved covenant of habitability violations).

251. MINN. STAT. § 504B.391 (2008) (formerly codified at MINN. STAT. § 566.35 (1998)). In *Rio Hot Properties, Inc. v. Judge*, the court affirmed the referee's conclusion that the fines are punitive and payable to the state. No. UD-01981005518 (Minn. Dist. Ct. May 21, 1999) (unlawful detainer decision and order).

252. In *Harris v. REDACTED*, the landlord agreed to an eviction settlement

Rent escrow actions and eviction actions that involve the same parties must be consolidated and heard on the dates scheduled for the eviction action.[253] Consolidating actions also may allow the court to grant relief beyond what it would do in the eviction action.[254]

Landlords may have tort liability related to housing repair problems. In *Bills v. Willow Run I Apartments*, the Minnesota Supreme Court held that an owner is not negligent per se for a violation of the uniform building code, unless (1) the owner knew or should have known of the violation, (2) the owner failed to take reasonable steps to remedy the violation, (3) the injury suffered was the kind the code was intended to prevent, and (4) the violation

adopted by court to pay tenant $500 at move out and $1,500 one week later. No. HC-031022520 (Minn. Dist. Ct. Dec. 15, 2003) (decision and order). He paid the first payment, but not the second. *Id.* The court ordered the landlord to provide discovery on ability to pay; after a trial, found the landlord in contempt of court for failing to pay the $1,500, fined the landlord, and ordered the landlord to jail, staying the order until the end of the month for the landlord to comply. *Id.* (Minn. Dist. Ct. Feb. 6, 2004) (decision and order). When the landlord did not comply, the court first issued a bench warrant for his arrest. *Id.* (Minn. Dist. Ct. Mar. 3, 2004) (bench warrant and decision and order). The court then ordered the landlord confined. *Id.* (Minn. Dist. Ct. Mar. 17, 2004) (decision and order). *See also* REDACTED v. Floy, No. HC-010829900 (Minn. Dist. Ct. Dec. 14, 2001) (findings, conclusion, and order) (ordering the landlord to be imprisoned or pay immediately for failure to pay damages ordered by court in earlier emergency relief action where the landlord rented condemned property, the housing inspector ordered the tenant to vacate, the court awarded damages for rental of condemned property by a specific date, and the landlord failed but had the ability to pay). *See generally* Hopp v. Hopp, 279 Minn. 170, 173–76, 156 N.W.2d 212, 216–18 (1968) (discussing civil contempt law in Minnesota); Cox v. Slama, 355 N.W.2d 401 (Minn. 1984) (holding defendant in civil contempt for failure to pay child support); MINN. STAT. § 588.01 (2008).

253. MINN. STAT. § 504B.385, subdiv. 8 (2008) (formerly codified at MINN. STAT. § 566.34 (1998)).

254. Smith v. Brinkman, No. HC-1000124900 (Minn. Dist. Ct. Mar. 9, 2000) (decision and order dismissing eviction action); Smith v. Brinkman, No. HC-1000202517 (Minn. Dist. Ct. May 10, 2000) (decision and order of expungement for one of the tenants) (involving consolidated eviction and rent escrow actions where landlord failed to prove statutory notice to quit, notice to increase rent given November 1 was not effective to increase rent December 1; presumption of retaliation applied to a rent increase notice with the landlord failing to prove a non-retaliatory purpose; habitability rent abatement of $800 over four months (38%); tenant awarded $300 in civil penalties for landlord visits without notice in which he was rude toward the tenant and her daughter; landlord ordered to make repairs with tenants authorized to make repairs and submit bills for court approval; landlord restrained from harassing tenant and household members with landlord allowed to enter only to make repairs with written twenty-four hours' notice; tenants awarded costs, disbursements and attorney's fees).

was the proximate cause of the injury.[255] While the collateral estoppel effect of eviction litigation is limited,[256] tenants should make a record in appropriate cases that the tenant is not litigating nor waiving a potential tort claim.[257]

2. Lack of a Rental License

Many cities require landlords to have rental licenses in order to rent out property. Minneapolis was one of the first, enacting in 1990 a new set of ordinances regulating rental dwelling licenses.[258] Some of the early district court decisions concluded that the landlord's failure to obtain the rental license warranted a suspension for collection of rent until compliance,[259] while more recent decisions dismissed the action for failure to obtain a license.[260]

255. 547 N.W.2d 693, 695 (Minn. 1996). The law of torts has not kept pace with modern developments in landlord and tenant law, leaving tenants relatively unprotected in tort for injuries resulting from apartment disrepair. *See* Lawrence R. McDonough, *Still Crazy After All of These Years: Landlords and Tenants and the Law of Torts*, 33 WM. MITCHELL L. REV. 427, 438–39 (2006).

256. See *supra* notes 64–66.

257. In *Judge v. Rio Hot Properties, Inc.*, the court made no findings or conclusions on tenant's potential tort claims as they did not litigate them in the summary proceeding. Nos. UD-1981202903, UD-1981005518, and UD-1981104522 (Minn. Dist. Ct. Dec. 18, 1998) (orders dismissing unlawful detainer action).

258. MINNEAPOLIS, MINN., CODE ch. 244, art. XVI, §§ 244.1800–.2010 (2009). Licensing status of properties by address is available at Official Website of Minneapolis, Minnesota, Search by Address, http://apps.ci.minneapolis.mn.us/AddressApp/SearchByAddress.aspx?AppID=PIApp (last visited Mar. 13, 2009).

259. Niskanen v. Fielder, C9-96-600751, slip op. at 1 (Minn. Dist. Ct. May 23, 1996) (decision and order) (holding that the landlord had entered into an illegal contract by renting unlicensed property in Duluth and could not profit from her wrongdoing); Peterson v. Pearson, UD-2951204800, slip op. at 1–2 (Minn. Dist. Ct. Feb. 12, 1996) (unlawful detainer decision and order allowing defendant to redeem premises) (ordering rent abatement until the landlord registered property under the Brooklyn Park licensing ordinance); Brown v. Owens, No. UD-1940726506, slip op. at 6–7 (Minn. Dist. Ct. Aug. 18, 1994) (decision and order denying plaintiff's claim) (prohibiting the landlord from demanding or collecting rent from the tenant until the landlord complied with the licensing requirements).

260. Ukatu v. REDACTED, No. HC-0307614501, slip op. at 1–2 (Minn. Dist. Ct. July 30, 2003) (order) (dismissing landlord-plaintiff's eviction because there was no rental license at time of filing, even though landlord later obtained license, and eviction case is moot when tenants have vacated, and granting expungement); Tri Star Developers, LLC v. REDACTED, No. HC-1011002522, slip op. at 2 (Minn. Dist. Ct. Oct. 16, 2001) (decision and order) (granting expungement where landlord rented without a rental license, which requires dismissal, and where

In 2007, the issue reached the appellate courts in *Beaumia v. Eisenbraun*, where the court of appeals held that failure to pay rent could not be a ground for eviction where the landlord failed to comply with a municipal requirement to license or register the rental unit.[261] The Alexandria City Ordinance made it unlawful to lease any residential property unless it had been registered with the city as a rental unit and a registration fee had been paid.[262]

In *Beaumia*, the landlord filed an eviction action when the tenants told the landlord they did not have the money to pay rent.[263] The district court ruled for the landlord, concluding that failure to register the rental unit was irrelevant to whether the landlord had the right to recover possession of the property.[264] The court of appeals reversed, first noting that if a tenant's duty to pay rent is excused, the eviction action must fail.[265] The court concluded that the landlord's failure to acquire the city-required certificate of occupancy eliminated the tenant's duty to pay rent, rendering eviction improper.[266] The court held that the tenants had no rental obligation during the period in which the property was unregistered and could credit rent paid during this period against rent that was unpaid after the landlord registered the property.[267] The court then concluded, because the credit for rent paid but not due was larger the rent due for the period in which the landlord had registered the property, the district court erred by evicting the tenants.[268]

Revocation of a rental dwelling license is proper where the owner received sufficient notice, was given the opportunity to be heard, and where the record demonstrates that revocation was based on the issues of which the owner had notice.[269]

securing license after filing the action does not purge the defect in filing without one); Connelly v. Schiff, No. HC 1000417515, slip op. at 2 (Minn. Dist. Ct. May 23, 2000) (order granting motion for expungement) (dismissing without prejudice where landlord failed to secure rental license).

261. No. A06-1482, 2007 WL 2472298, at *1–2 (Minn. Ct. App. Sept. 4, 2007).

262. *Id.* at *2 (citing ALEXANDRIA CODE OF ORDINANCES, § 5.08, subdiv. 3 (2006)).

263. *Id.* at *1.

264. *Id.*

265. *Id.* (citing Mac-Du Props. v. LaBresh, 392 N.W.2d 315, 316–17 (Minn. Ct. App. 1986)).

266. *Id.* at *2.

267. *Id.*

268. *Id.*

269. Zorbalas v. City of Minneapolis, No. A05-2141, 2006 WL 3490455, at *1 (Minn. Ct. App. Dec. 5, 2006).

3. Breach of an Express Covenant that Creates a Condition Precedent to Payment of Rent

In *Mac-Du Properties v. LaBresh*, a commercial lease provided that rent shall begin thirty days after the city granted an occupancy permit to the tenant and the landlord completed improvements, and that the lease was written and accepted by the parties subject to the city approving the occupancy by the tenant.[270] The landlord did not complete the improvements, the city did not issue the permit, the tenant did not pay the rent, and the landlord filed an eviction action for nonpayment of rent.[271] On appeal, the court held that the lease created a condition precedent to the tenant's obligation to pay rent and that the tenant did not owe rent.[272]

4. Notices to Increase Rent or Fees

If the lease does not provide for increasing the rent, the landlord may not increase the rent until the lease expires, unless the tenant agrees to an increase. If the lease provides for increasing the rent with notice, the landlord must comply with the notice provision. In a month-to-month lease, the landlord should give notice of the rent increase at least one month before the rent increase. Since rent often is the most significant element of the lease, increasing the rent is equivalent to terminating the present lease and entering into a new lease with a higher rent, and termination of a month-to-month lease requires written notice before the last month of the tenancy.[273]

In a mobile home lot lease, the landlord must give sixty days' written notice of the rent increase and may increase the rent only twice in any twelve month period.[274] The rent also may not be increased to pay any court or government imposed civil or criminal

270. *Mac-Du Props.*, 392 N.W.2d at 317–18.
271. *Id.* at 316–17.
272. *Id.* at 319.
273. Grider v. Hardin, No. UD-1980501520, slip op. at 2–3 (Minn. Dist. Ct. May 19, 1998) (decision and order denying plaintiff's petition for unlawful detainer with prejudice) (holding that there was no change in rent or late fees where landlord failed to give written notice); *see also* Minneapolis Pub. Hous. Auth. v. Papasodora, No. UD-1960611515 (Minn. Dist. Ct. July 17, 1996) (decision and order) (stating that public housing notice mailed February 29 could not be received in February and was untimely for an April 1 rent increase and that void notice could not be a basis for a future rent increase).
274. MINN. STAT. § 327C.06 (2008).

penalty.[275] Only reasonable rent increases may be enforced against existing tenants.[276]

The landlord also can waive a notice to increase rent. In *First National Realty v. Gumm*, the landlord increased the rent effective November 1 but continued to accept rent at the old amount from November through April.[277] The court concluded that the landlord waived the right to evict the tenant for failure to pay the difference between the old rent and the new rent by continuing to accept the old amount of rent without demanding the new amount.[278]

A landlord may not enforce a retaliatory rent increase notice. The defendant must tender to the court or the plaintiff the amount of rent due before the increase and prove by a preponderance of the evidence that (1) the defendant, (a) in good faith, attempted to secure or enforce the defendant's rights under the lease or federal, state, or local laws; or (b) reported the plaintiff's violation of any health, safety, housing, or building code or ordinance to a Minnesota governmental authority, and (2) the plaintiff increased the rent or decreased service as a penalty in whole or in part for the defendant's protected activity.[279] Some local ordinances also include protection against retaliation.[280] If the defendant proves a

275. *Id.* § 327C.06, subdiv. 2.

276. *Id.*; Pilgrim v. Crescent Lake Mobile Colony, 582 So.2d 649, 651–52 (Fla. Ct. App. 1991) (stating that rent increases 15% to 55% above fair market rent with deteriorated conditions were unconscionable).

277. No. UD-910508527, slip op. at 2–3 (Minn. Dist. Ct. May 31, 1991) (order dismissing plaintiff's motion for unlawful detainer action) (stating that violations of statutory covenants of habitability existed and awarding release of escrowed rent).

278. *Id.*

279. MINN. STAT. § 504B.285, subdiv. 3 (2008) (formerly codified at MINN. STAT. § 566.03 (1998)). Proving retaliation under section 504B.285 may be difficult. However, if the defendant is the only tenant who has made complaints and the only tenant whose rent was increased, a case could be made for retaliation. Proving retaliation under section 504B.441 (formerly codified at section 566.28 (1998)) is considerably easier. While section 504B.285, subdivision 3 does not create a presumption of retaliation in certain cases, section 504B.441 does include a presumption of retaliation if the landlord tries to evict the tenant, increase the tenant's obligations, or decrease services to the tenant within ninety days after the tenant files a complaint about a violation of a code, the covenants of habitability, or the lease. In *Smith v. Brinkman*, the court cited section 504B.441 to hold in consolidated eviction and rent escrow actions that the presumption of retaliation applied to a rent increase notice with the landlord failing to prove a non-retaliatory purpose. No. HC-1000124900 (Minn. Dist. Ct. Mar. 9, 2000) (decision and order dismissing eviction action).

280. MINNEAPOLIS, MINN., CODE § 244.80 (2009) provides a presumption of retaliation where the landlord attempts to terminate the tenancy after the tenant

retaliatory rent increase, the rent would remain at the pre-increase amount.[281]

5. Late Fees and Other Fees

Some leases provide for an additional fee to be paid if the rent is not paid by a certain date. Some leases provide for a flat fee, while others provide for a daily fee. The plaintiff has the burden of proving the existence of late fees.[282]

Liquidated damages cannot be recovered if they are not provided for in the lease.[283] In leases, fees based upon a breach of the lease must be in the form of liquidated damages[284] and not an unenforceable penalty.[285] Generally, liquidated damages serve as a reasonable forecast of general damages resulting from a breach.[286] The controlling factor is whether the amount agreed upon is reasonable or unreasonable in light of the contract as a whole, the nature of the damages contemplated, and the surrounding circumstances, and not the intention of the parties or their

complains to the inspection agency, or the tenant of the city sues the landlord over housing conditions. The presumption has no time limit. *Id.*

281. Line v. Reynolds, No. UD-1960612512 (Minn. Dist. Ct. Aug. 12, 1996) (decision and order for defendant occupants and for rent abatement) (involving consolidated eviction and rent escrow actions; tenant proved that proposed 21% rent increase was in retaliation for tenant's complaints of repair needs, and landlord did not prove that the rent increase was based on other factors); Lundstrom v. Colglazier, No. UD-1960524502 (Minn. Dist. Ct. June 17, 1996) (decision and order) (stating that tenants proved that landlord's proposed rent increase was in retaliation for complaints about repairs).

282. In Smithrud v. McDaniel, neither party testified regarding the landlord's late fee claim of $150. No. UD-195050529 (Minn. Dist. Ct. May 22, 1995) (decision and order). The court found that it was not clear what late fees the landlord asserted were due and for which months, and concluded that the landlord had not proven that the tenants owed $150 for late fees. *Id.; see also* Clark v. Urban Invs., No. UD-1970821901 (Minn. Dist. Ct. Sept. 10, 1997) (decision and order) (stating that claimed late fees were not based on lease but on later notice to increase late fees; landlord did not prove it was entitled to unilaterally amend lease to increase late fees).

283. Cook v. Finch, 19 Minn. 407, 413, 19 Minn. (Gil.) 350, 358 (1872) (decision and order); Brooklyn Ctr. Leased Hous. v. REDACTED, No. HC-030819518 (Minn. Dist. Ct. Sept. 16, 2003) (decision and order).

284. Local 34 State, County & Mun. Employees v. County of Hennepin, 310 Minn. 283, 287–88, 246 N.W.2d 41, 44 (1976) (stating that because the issue of damages was not raised at trial, it may not be considered on appeal).

285. Palace Theatre, Inc. v. Northwest Theatres Circuit, Inc., 186 Minn. 548, 553, 243 N.W. 849, 851 (1932).

286. Zirinsky v. Sheehan, 413 F.2d 481, 485 (8th Cir. 1969).

expression of intention.[287] Where actual damages cannot be measured, liquidated damages not manifestly disproportionate to actual damages are enforceable. Where actual damages are susceptible of definite measurement, an amount greatly disproportionate is an unenforceable penalty.[288] The actual damages for late payment of rent may be measured without difficulty: the legal rate of interest plus the actual costs caused by the late payment.[289]

Minnesota courts have found certain late fee provisions to be unenforceable penalties.[290] Like other lease provisions, late fees can be waived.[291] Tenants are not liable for late fees where the tenant properly withheld rent.[292] Rules for late fees in public and

287. Gorco Constr. Co. v. Stein, 256 Minn. 476, 481–82, 99 N.W.2d 69, 74 (1959); Meuwissen v. H.E. Westerman Lumber Co., 218 Minn. 477, 483, 16 N.W.2d 546, 549–50 (1944).

288. *Gorco*, 256 Minn. at 482–83, 99 N.W.2d at 75.

289. United Shoe Mach. Co. v. Abbott, 158 F. 762, 765 (8th Cir. 1908); Maudlin v. Am. Sav. & Loan Ass'n, 63 Minn. 358, 367, 65 N.W. 645, 649 (1896) (actual damages of breach of term to pay money "susceptible of definite measurement").

290. Wheeler v. REDACTED, No. HC-030905517 (Minn. Dist. Ct. Oct. 3, 2003) (decision and order) (holding $1,005 in late fees was excessive and although tenant did not prove habitability violations tenant may still redeem); Cherrier v. Harper, No. UD-1940113508, slip op. at 2 (Minn. Dist. Ct. Feb. 4, 1994) (decision and order for plaintiff and writ of restitution issued subject to defendant's right of redemption) (stating that late charge of $15 if rent was more than one day late and $20 after two days was an unenforceable penalty); Cent. Cmty. Hous. Trust v. Anderson, No. UD-1900611534, slip op. at 3 (Minn. Dist. Ct. July 6, 1990) (order denying plaintiff's unlawful detainer action) (stating that $20 late fee bore no relation to cost of landlord's preparation of form notice and slipping the notice under the tenant's door, triggering the tenant's prompt action in paying the rent, where government-subsidized housing is involved); Larson v. Cooper, No. UD-1880209557, slip op. at 8 (Minn. Dist. Ct. Mar. 21, 1988) (order abating defendant's rent because of breach in covenant of habitability) (stating that $10 per day late fee was an unenforceable penalty). *But see* 606 Vandalia P'ship v. JLT Mobil Bldg. Ltd. P'ship, No. C3-99-1723 (Minn. Ct. App. Apr. 25, 2000) (affirming district court's conclusion that commercial late fee was a proper liquidated damage and not an unenforceable penalty or unconscionable provision).

291. Chaska Vill. Townhouses & Lifestyle, Inc. v. Edberg, No. 91-27365, slip op. at 3 (Minn. Dist. Ct. Apr. 1, 1991) (order denying plaintiff's unlawful detainer action) (deciding that plaintiff induced defendant to believe that late rental payments would continue to be accepted without consequences).

292. Cent. Manor Apartments v. Beckman, No. UD-1980513525, slip op. at 3 (Minn. Dist. Ct. May 27, 1998) (order denying plaintiff's unlawful detainer action). "When a tenant withholds rent due to habitability issues which are then proven by the tenant, fees for late payment of rent are not due for the month a tenant withheld rent. Assessing a late fee would frustrate the tenant's right to withhold rent to remedy habitability problems, and is contrary to public policy." *Id.*

subsidized housing vary from program to program.[293]

6. Public and Government-Subsidized Housing

Notice requirements vary depending on the program. In government-subsidized and public housing projects, the landlord must give written notice before commencement of an eviction action for nonpayment of rent.[294] Even if the tenant fails to pay the rent, the tenant may argue that nonpayment of rent is simply a prima facie cause for termination of the lease or was occasioned by circumstances beyond the tenant's control; that the tenant notified the landlord of this; and that the tenant made a diligent effort to pay when the tenant was able.[295]

Under the Section 8 voucher program, the landlord may not require the tenant to pay additional fees or rents not approved by the housing authority.[296] Since the tenant is only responsible for

293. In most government-subsidized housing projects, the landlord may not evict the tenant for not paying late fees. U.S. DEP'T OF HOUS. & URBAN DEV. (HUD), HANDBOOK NO. 4350.3, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS § 4-15(d) (1981) [hereinafter HUD HANDBOOK NO. 4350.3]. This provision does not apply to Section 202 elderly handicap housing projects that receive Section 8 or rent supplement assistance. In the two subsidized housing project programs not covered by HUD Handbook No. 4350.3, the Section 8 moderate rehabilitation and project-based certificate assistance program, the regulations do not provide for late fees or other charges in addition to rent. 24 C.F.R. §§ 882.401, .403–.405, .414 (2008). In the Section 8 existing housing certificate and voucher programs, the regulations only provide for late fees payable by the housing authority for late subsidy payments and do not provide for tenant late fees. *Id.* § 982.451. In public housing, the fees must be reasonable. *Id.* § 966.4(b)(3). In mobile home park lot tenancies, the arrearage may not include any fees other than those specified in the statute. MINN. STAT. § 327C.03 (2008) (certain fees for installation and removal of the home, late rent, pets, maintenance, and security deposits); *id.* § 327C.10, subdiv. 1 (stating that a violation of section 327C.03 is a valid defense for the failure to pay rent). *See* Hedlund v. Davis, No. C1-91-1687 (Minn. Dist. Ct. Dec. 31, 1991) (order denying plaintiff's eviction action and fee request) (involving improper maintenance charges because no written notice was provided, pursuant to the lease); Allison v. Sherburne County Mobile Home Park, 475 N.W.2d 501, 503 (Minn. Ct. App. 1991) (stating that park owner may charge electricity service fee identical to the fee residents would have to pay to public utility, even if the fee exceeds the cost to the park owner).

294. The exception is the Section 8 voucher program. *See infra* notes 424–33 and accompanying text.

295. *See* Hous. Auth. of St. Louis County v. Boone, 747 S.W.2d 311, 314 (Mo. Ct. App. 1988) (finding that tenant was not at fault for nonpayment of rent where public housing is involved); Maxton Hous. Auth. v. McClean, 328 S.E.2d 290, 294 (N.C. 1985) (same).

296. Hwang v. Jones, No. UD-1960319526, slip op. at 4–5 (Minn. Dist. Ct. Apr.

the tenant's share of the rent, the landlord may not recover from the tenant the government subsidies portion of the rent withheld by the housing authority for the landlord's failure to keep the apartment in reasonable repair.[297] In public and subsidized housing projects where the landlord calculates the tenant's rent based upon the tenant's income, the landlord may not evict the tenant based on improper rent assessments by the landlord.[298]

7. Waiver of Rent Due by Accepting Partial Payment

The landlord and tenant can agree, only in writing, that partial payment of rent, accepted by the landlord before issuance of the order for the writ of restitution, may be applied to the balance due and does not waive the landlord's action for possession based on nonpayment of rent.[299] Acceptance of a partial payment of rent

4, 1996) (order granting termination of Section 8 tenancy).

297. 24 C.F.R. §§ 982.310(b), .451(b)(4) (2008); Mattson v. Harmon, No. UD-1961203552, slip op. at 7–9 (Minn. Dist. Ct. Jan. 28, 1997) (order granting plaintiff's judgment for restitution of the premises subject to tenant's right to redeem) (holding tenant not responsible for rent subsidy withheld by housing authority which is not due to tenant's conduct; landlord cannot require tenant to pay full rent or evict tenant for failing to pay full rent; landlord bound by housing authority's reinstatement of contract); Wiley v. Flax, No. UD-1961107516 (Minn. Dist. Ct. Nov. 25, 1996) (order denying plaintiff's unlawful detainer action) (stating that landlord could enforce Section 8 approved lease but could not enforce contradictory private lease or subsequent side agreement for a higher rent and change in responsibility for utilities).

298. *See generally* NATIONAL HOUSING LAW PROJECT, *supra* note 100, at ch. 3, 5 (providing general overview of individual tenant rents and extra charges). *See also* Innsbruck Ltd. P'ship v. Askvig, No. C-5-95-0604, slip op. at 6–7 (Minn. Dist. Ct. Apr. 19, 1995) (order granting defendant tenant possession) (finding that tenant did not under-report income and paid too little rent, since tenant could pool income and expenses from both of her jobs). In *Buffalo Court Apartments v. Velde*, the subsidized housing project sent a letter to the tenant retroactively terminating the subsidy, claiming that another person was living with her in violation of the lease. No. C6-98-1798 (Minn. Dist. Ct. Sept. 14, 1998) (order dismissing plaintiff's unlawful detainer action). The tenant claimed that the person was a guest and not a resident and provided documentation. *Id.* The landlord did not give the required ten days' notice to remove the subsidy or the thirty days' notice to terminate the lease. *Id.* The court concluded that the landlord had not proven that the tenant violated the lease, the landlord failed to comply with regulations in increasing the tenant's rent, and failure to provide proper notice prevented the landlord from removing the tenant's rent subsidy. *Id.* The court dismissed the action and ordered that the landlord immediately reinstate the tenant's rent subsidy, and if the subsidy was not available, the landlord must credit the tenant's rent in the same amount. *Id.*

299. MINN. STAT. § 504B.291, subdiv. 1(c) (2008) (formerly codified at MINN. STAT. § 504.02 (1998)).

without a written agreement waives the eviction action based on the remaining rent due.[300] A provision in a lease purporting to be a non-waiver clause may not cover partial payment of rent.[301]

8. When and How Much Rent Is Due

The plaintiff must prove that rent is due by a preponderance of the evidence.[302] Where the landlord claims rent due and the tenant claims rent was paid, if the landlord has no business records to support the claim, the landlord may not be able to prove that the rent is due.[303] Where the parties have agreed to a rent credit, the court should enforce the credit.[304] The parties may agree to rent payments in installments.[305]

Where the lease and the custom of the parties do not indicate when the rent is due, the rent may not be due until the end of the term.[306] The landlord's regular acceptance of a specific sum from

300. Exodus Cmty. Dev. Co. v. REDACTED, No. HC-040109515 (Minn. Dist. Ct. Jan. 23, 2004) (housing court decision and order) (dismissal where landlord accepted part payment of rent); Svendsen v. REDACTED, No. HC-031006510 (Minn. Dist. Ct. Oct. 15, 2003) (housing court decision and order) (same); Brooklyn Park Hous. Assocs. I, LLP v. REDACTED, No. HC-1010124505 (Minn. Dist. Ct. Feb. 7, 2001) (decision and order) (landlord may pursue claim for part payment of rent only if there is a written document reserving that right; landlord may amend complaint to claim current rent claim not waived by part payment, with tenant retaining right to redeem).

301. Wirth Cos. v. Victor, No. UD-1931108551, slip op. at 3–4 (Minn. Dist. Ct. Nov. 30, 1993) (order dismissing plaintiff's unlawful detainer action) (finding that a landlord may satisfy the requirement for a written agreement stating that part payment of rent does not waive eviction with a provision in the lease, but a non-waiver clause directed at non-financial breaches does not include part payment of rent).

302. *See* Kahn v. Greene, No. UD-1940330506, slip op. at 5 (Minn. Dist. Ct. May 25, 1994) (order dismissing plaintiff's claim to evict) (finding that no credible evidence existed to show that defendants did not pay rent).

303. Brooklyn Ctr. Leased Hous. v. REDACTED, No. HC-030819518 (Minn. Dist. Ct. Sept. 16, 2003) (decision and order) (involving ambiguities in lease concerning the deposit, rent and pro-rated rent, and lack of documentation construed against landlord); Ricke v. Villebrun, No. UD-1961112566, slip op. at 2–3 (Minn. Dist. Ct. Dec. 5, 1996) (order denying unlawful detainer action and awarding defendant rent abatement) (concluding landlord did not prove rent was due by a preponderance of the evidence where landlord failed to provide business records).

304. Brown v. Owens, No. UD-1940726506, slip op. at 5–6 (Minn. Dist. Ct. Aug. 18, 1994) (order denying plaintiff's claim for restitution of the premises) (enforcing oral agreement for rent credit).

305. Brook v. Boyd, No. C8-96-47 (Minn. Dist. Ct. Feb. 13, 1996) (order denying plaintiff's unlawful detainer action) (holding rent payable semi-monthly).

306. *In re* Hoff's Estate, 63 Minn. 296, 297, 65 N.W. 464, 464 (1895); First Nat'l

the tenant based on the tenant's written offer to pay that sum, and the landlord's acceptance of it for the following eight months without any written or oral objections to it, establishes the parties' agreement to rent at that sum.[307]

9. Utilities

Utilities and other charges may be considered rent, entitling the landlord to redeem the premises by paying the amount due.[308] Where the landlord claims that the tenant owes money on utility bills but the account was in the landlord's name and the landlord has not given the tenant copies of the bills, the court should order the landlord to give the tenant the bills and time to arrange to pay them.[309]

Landlords generally must be the customer of record and responsible bill payer for shared meters, in which utility services are provided to a residential building with a single meter providing service to an individual unit and all or parts of the common areas or other units.[310] The landlord must advise the utility provider about the status of the building.[311] This requirement may not be waived by contract or other method.[312] However, the statute "does not require a landlord to contract and pay for utility service provided to each residential unit through a separate meter which accurately measure the unit's use only."[313]

Bank of Omaha v. Omaha Nat'l Bank, 191 Neb. 249, 251, 214 N.W.2d 483, 485 (1974). *See also supra* Part II(F) and accompanying notes.

307. Orchestra Hall Assocs. v. Crawford, No. UD-1960119508 (Minn. Dist. Ct. Feb. 13, 1996) (decision and order).

308. Cent. Union Trust Co. of N.Y. v. Blank, 168 Minn. 312, 316, 210 N.W. 34, 35 (1926) (stating that covenant to pay taxes is part of consideration for payment of lease); Am. Land Real Estate Inv. Corp. v. Pokorny, No. C0-90-1649, 1990 WL 204280, at *1 (Minn. Ct. App. Dec. 18, 1990) (order affirming trial court's denial of unlawful detainer) (holding that an obligation to buy insurance equivalent to paying rent); Kahn v. Greene, No. UD-1940330506, slip op. at 7 (Minn. Dist. Ct. May 25, 1994) (order dismissing plaintiff's claim to quit) (stating that a water bill was deemed as rent).

309. Aker v. Kennedy, No. UD-1950908541, slip op. at 3–4 (Minn. Dist. Ct. Oct. 19, 1995) (order denying unlawful detainer).

310. MINN. STAT. § 504B.215, subdiv. 2 (2008) (formerly codified at MINN. STAT. § 504.185 (1998)).

311. *Id.*

312. *Id.*

313. *Id.* The landlord's failure to comply with the statute is a violation of the covenant of habitability in section 504B.161, subdivision 1(a) (formerly codified at section 504.18 (1998)), and section 504B.221 (formerly codified at section 504.26 (1998)). *Id.* The reference to the covenants of habitability should make it clear

Before the year 2000, a landlord using shared meters who wanted to shift the burden of paying for utilities to the tenant had two options: (1) calculate past usage and factor it into the rent, or (2) install separate and accurate meters. The landlord could not simply pay the utility bill and then re-bill the tenant.[314] In 2000, the Minnesota Legislature revised Minnesota Statutes section 504B.215 to allow a landlord to apportion a shared meter bill among residential tenants in narrowly proscribed circumstances.[315] Shared meters are common in duplex units. Even where there are meters for each unit, one meter may be covering the common areas.[316]

that a tenant is entitled to rent abatement when the tenant is forced to pay for utility service through a single meter that does not reflect the use in the tenant's apartment. Amsler v. Wright, No. UD-1960502510, slip op. at 8 (Minn. Dist. Ct. May 30, 1996) (order granting possession to defendant tenant) (finding that the landlord was responsible for all utilities services that do not separately and accurately measure the tenant's sole use of utilities).

314. Carr v. Jerry Schlink, Associated Enters. of Minneapolis, No. UD-1980601900 (Minn. Dist. Ct. Apr. 1, 1999) (order and memorandum) (affirming referee decision and stating that the clear language of the statute and legislative history prohibit landlord re-billing for utility service on shared meters).

315. 2000 Minn. Laws ch. 268 (codified as amended at MINN. STAT. § 504B.215 (2008)). The revision became effective August 1, 2000, and is retroactive to August 1, 1995 for leases that already included a provision for apportioning shared meter utility charges where no judicial or administrative court had rendered a decision. The amended statute provides the conditions under which a landlord of a single-metered residential building may apportion bills among tenants. *See* § 504B.215, subdiv. 2a. The landlord must provide prospective tenants with notice of the total utility cost for the building for each month of the most recent calendar year. *Id.*, subdiv. 2a(1). The landlord must state in writing an equitable method of apportionment and the frequency billing by the landlord. *Id.*, subdiv. 2a(2). "The lease must contain a provision that, upon a tenant's request, [the] landlord must provide a copy of the actual utility bill for the building along with each apportioned utility bill." *Id.*, subdiv. 2a. Upon a tenant's request, the landlord must also provide past copies of actual utility bills for any period of the tenancy for which the tenant received an apportioned utility bill for the proceeding two years or the period since the landlord acquired the building, whichever is less. *Id.* The landlord and tenant may agree to use a lease term of one year or more with the option to pay bills "under an annualized budget plan providing for level monthly payments based on a good faith estimate of the annual bill." *Id.* By September 30 of each year, the landlord must inform tenants in writing of the possible availability of energy assistance, including the toll-free telephone number of the administering agency. *Id.*

316. Washington v. Okoiye, No. UD-1981029901, slip op. at 3 (Minn. Dist. Ct. Nov. 20, 1998) (order granting tenant rent abatement, compliance, and dismissing unlawful detainer action) (involving consolidated eviction and emergency relief actions). The landlord violated shared meter statute when tenant's meter covered her first floor apartment and the common basement which the landlord used for an office and for personal use. *Id.* The court imposed a $500 violation of the shared meter statute, all of which could be credited against rent. *Id.*

A landlord may not unlawfully terminate or interrupt utility service to the tenant.[317] In *Washington v. Okoiye*, the court consolidated eviction and emergency tenant remedies actions, and awarded $100 for rent abatement for water shutoff and $500 in utility termination damages, among other abatements.[318]

A tenant can seek rent abatement for the tenant's payment of utility or essential services owed by the landlord where the utility threatens service termination.[319] When a municipality or company supplying home heating oil, propane, natural gas, electricity, or water to residential housing disconnects service, or has given notice to disconnect service because the landlord who contracted for the service failed to pay for it, the tenant may pay to have the service reconnected.[320] Before paying for the service, the tenant has the option to give the landlord or landlord's agent oral or written notice of the tenant's intent to pay the bill after forty-eight hours, or a shorter period if reasonable under the circumstances, if the owner does not pay for the service.[321] If the notice is oral, the tenant must mail or deliver written notice within twenty-four hours after giving the oral notice.[322] If natural gas, electricity, or water has been discontinued or if the landlord has not paid the bill after notice by the tenant, the tenant may pay the outstanding bill for the most recent billing period if the company or municipality will restore the service for at least one billing period.[323] If home heating oil or propane has been discontinued or if the landlord has not paid the bill after the tenant's notice, the tenant may order and pay for one month's supply of a proper grade and quality of oil or propane.[324] The tenant's payment to the company or municipality is considered payment of rent to the landlord, and the tenant may deduct the payment to the company or municipality from the next rent payment to the landlord after submitting receipts for the

317. § 504B.221 (2008) (formerly codified at § 504.26 (1998)). Remedies may include an order for restoration of service, rent abatement, statutory damages of the greater of treble actual damages or $500, and attorney fees. *Id.*

318. No. UD-1981029901, slip op. at 4 (Minn. Dist. Ct. Oct. 8, 1999) (order denying unlawful detainer action); *see also* Okoiye v. Washington, No. UD-19809090564, slip op. at 4 (Minn. Dist. Ct. Nov. 20, 1998) (unlawful detainer decision and order).

319. § 504B.215, subdiv. 3 (formerly codified at § 504.185 (1998)).

320. *Id.*, subdiv. 3(a).

321. *Id.*, subdiv. 3(a)(4).

322. *Id.*

323. *Id.*, subdiv. 3(b).

324. *Id.*, subdiv. 3(h).

payment to the landlord.[325] City ordinances also may allow the tenant to pay and deduct.[326]

Minnesota's 2008 Legislature made several additions to the landlord and tenant utilities statute. First, it stated requirements for posting of the service disconnection notice.[327] Second, it clarified that the tenant may continue service by paying only current and not past charges.[328] Third, it allowed tenants in buildings with less than five units to restore gas or electric service by becoming the prospective payer of record, with the utility treating the tenant like a new customer.[329]

10. Redemption

An eviction action based upon nonpayment of rent is equivalent to a demand for rent. "The tenant may, at any time before possession has been delivered, redeem the tenancy and be restored to possession by paying to the landlord or bringing to court the amount of the rent that is in arrears, with interest, costs of the action, and an attorney's fee not to exceed $5, and by performing any other covenants of the lease."[330] The statute restricts the landlord's right to restitution of the premises.[331] The right of redemption exists "until a court has issued an order dispossessing the tenant and permitting reentry by the landlord,"[332] or until the court signs the order restoring the premises to the landlord.[333] Waiver of the right of redemption requires clear and

325. *Id.*, subdiv. 3(i); Moore v. Shelly, No. UD-1980619500 (Minn. Dist. Ct. July 8, 1998) (order denying unlawful detainer action) (providing credit against rent for tenant payment after notice of $1,086 for water and gas services). The tenant's rights under the statute do not apply to conditions caused by the willful, malicious, or negligent conduct of the tenant or tenant's agent; may not be waived or modified; and are an addition to and do not limit other rights available to the tenant, including the right to damages. § 504B.215, subdiv. 4.

326. MINNEAPOLIS, MINN., CODE § 244.590 (2009).

327. § 504B.215, subdiv. 3., amended by 2008 Minn. Laws ch. 313.

328. *Id.*

329. *Id.*

330. MINN. STAT. § 504B.291, subdiv. 1 (2008) (formerly codified at MINN. STAT. § 504.02 (1998)). The right to redeem does not apply to an action for breach that does not include a claim for rent. Castaways Marina, Inc. v. Dedrickson, No. C1-02-1425, 2003 WL 1961861, at *4 (Minn. Ct. App. Apr. 29, 2003).

331. 614 Co. v. D. H. Overmayer Co., 211 N.W.2d 891, 893–94 (1973).

332. *Id.* at 894.

333. Paul McCusker & Assocs. v. Omodt, 359 N.W.2d 747, 749 (Minn. Ct. App. 1985); Gear Props. v. Jacobs, No. C1-97-2266 (Minn. Ct. App. Sept. 1, 1998) (order

affirming trial court's restitution order) (stating that redemption must occur before possession has been delivered to plaintiff).

The court may permit a tenant who wants to redeem and has already paid or brought into court all of the rent in arrears, but is unable to pay the statutory interest, attorney's fees and costs, to pay these additional amounts in the period when the court otherwise stays issuance of the writ of recovery. § 504B.291, subdiv. 1(b). The court also may deny restitution of the premises, conditioned on the defendant's payment of the arrearage within a specific time. In *614 Co.*, the court affirmed trial court orders allowing commercial tenant one month to pay amounts in default. 211 N.W.2d at 893, affirming the district court's first and second interlocutory orders. *See* 614 Co. v. D. H. Overmayer Co., No. 204678 (Minn. Dist. Ct. Apr. 22, 1972) (first interlocutory order); *id.* (Minn. Dist. Ct. July 9, 1972) (second interlocutory order). *See* Schaapveld v. Crump, No. UD-1951011528, slip op. at 5–6 (Minn. Dist. Ct. Oct. 31, 1995) (order denying unlawful detainer and abating rent) (providing assurance of payment, given one month to pay portion of rent due, and tenant given two weeks from date of hearing to pay balance).

If the court allows the tenant to redeem but the tenant fails to do so, the court can consider whether the tenant made a good faith effort. In *Huntington Place v. Scott*, the court ordered the tenant to pay rent that day. No. UD-1980409509, slip op. at 3–4 (Minn. Dist. Ct. Apr. 30, 1998) (motion partial transcript). The tenant contacted county emergency assistance that day, which agreed to make payment but did not accomplish it that day. *Id.* The court concluded that the tenant made a good faith effort to redeem, and in fact redeemed and ordered the judgment and writ vacated. *Id. But see* Clark v. Smith, No. A04-1850, 2005 WL 1669123, at *2 (Minn. Ct. App. July 19, 2005) (affirming eviction where tenant had promised rent payment but had not made the payment before the trial court's decision); Jasa v. LaMac Cleaners, Inc., No. C4-02-1239, 2003 WL 174729 (Minn. Ct. App. Jan. 28, 2003) (affirming referee determination that tenant did not redeem the rented premises in a timely manner, rejecting a substantial compliance argument).

The redemption statute limits attorney fees not exceeding $5. § 504B.291, subdiv. 1(a). In a commercial case where the lease provided for attorney's fees in an action based upon breach of the lease, the trial court's denial of restitution conditioned upon payment of rent, interest, and attorney's fees was upheld. *614 Co.*, 211 N.W.2d at 894. However, in *Cheyenne Land Co. v. Wilde*, the court of appeals affirmed the trial court's decision that the statutory limitation of $5 in attorney's fees governs residential cases. 463 N.W.2d 539, 539 (Minn. Ct. App. 1990). *See also* Cityview Coop. v. Marshall, No. C6-99-968, 2000 WL 16334 (Minn. Ct. App. Jan. 11, 2000) (holding that a $5 attorney's fee limit applied to cooperative which chose landlord-tenant law to govern the relationship and the eviction action as a remedy).

The right to redeem may be limited in month-to-month tenancies. In *University Community Properties v. New Riverside Cafe*, the Minnesota Supreme Court held that the right of redemption was unavailable to periodic tenants, including month-to-month tenants. 268 N.W.2d 573, 575 (Minn. 1978); *see also* Birk v. Lane, 354 N.W.2d 594, 596–98 (Minn. Ct. App. 1984). However, *New Riverside Cafe* should be read narrowly and not applied to residential tenancies. In *New Riverside Cafe*, the tenancy was a commercial tenancy. 268 N.W.2d at 574. Plaintiff served a fourteen days' notice under Minnesota Statutes section 504B.135 (formerly codified at Minnesota Statutes section 504.06 (1998)), and thus defendant could have paid the rent during this period. *Id.* Usually, the summons and complaint is the first notice that the defendant receives and it serves as a demand for rent.

convincing evidence of such intent to override judicial abhorrence of forfeiture.[334] A lease requirement waiving the tenant's right to the eviction process and the right to redeem the premises is void as a violation of public policy.[335]

A separate statute governs redemption in mobile home park lot rentals.[336] The tenant may redeem only twice in any twelve-month period, unless the tenant pays the landlord's actual reasonable attorney's fees for each additional redemption.[337]

11. Violation of Tenant Privacy and Security

A landlord may enter the tenant's premises only for a "reasonable business purpose and after making a good faith effort to give the residential tenant reasonable notice under the circumstances . . . ."[338] A tenant "may not waive and the landlord may not require the residential tenant to waive the residential tenant's right to prior notice . . . ."[339] The statute sets out several reasonable business purposes for landlord entry,[340] and several

§ 504B.291. Defendants attempted redemption after the trial. *New Riverside Cafe*, 268 N.W.2d at 574. In Stevens Court v. Steinberg, Nos. UD-92932, UD-92480, UD-92483 (Minn. Dist. Ct. Aug. 30, 1978) (order), the court distinguished *New Riverside Cafe* on the above grounds, noting that the supreme court did not intend to disenfranchise the majority of tenants in the state. *Id.*

334. *614 Co.*, 211 N.W.2d at 894; Soukup v. Molitor, 409 N.W.2d 253, 256–57 (Minn. Ct. App. 1987).

335. Duling Optical Corp. v. First Union Mgmt., Inc., No. C5-95-2718 (Minn. Ct. App. Aug. 13, 1996) (order affirming in part and reversing in part trial court's decision).

336. MINN. STAT. § 327C.11, subdiv. 1 (2008).

337. *Id.* In Kjellbergs, Inc. v. Herrera, the mobile home park lot owner brought an eviction action for nonpayment of rent. No. CX-98-0363 (Minn. Dist. Ct. Mar. 11, 1998) (decision and order). The tenant, who did not speak English and was unfamiliar with the court system, waited in the hallway for his case to be called and defaulted. *Id.* The tenant moved to vacate the default judgment. *Id.* The landlord claimed that, as a month-to-month tenant, the tenant did not have the right to redeem, so the motion should be denied. *Id.* (citing *New Riverside Cafe*, 268 N.W.2d 573). The court concluded that the tenant defaulted due to excusable neglect, and that the tenant had the right to redeem the property. *Id.* The court distinguished *New Riverside Cafe*, noting that the *New Riverside Cafe* court concluded that redemption would be negligible in a month-to-month tenancy at will as the lease could be terminated on one month's notice, while in this case, the landlord could terminate the lease only for cause and with proper notice. *Id.*

338. MINN. STAT. 504B.211, subdiv. 2 (2008) (formerly codified at MINN. STAT. § 504.183 (1998)).

339. *Id.*

340. *Id.*, subdiv. 3.

exceptions to the notice requirement.[341] If the landlord substantially violates the statute, the tenant may use a tenants' remedies action or emergency tenants' remedies action to enforce the statute and ask for a rent reduction, full rescission of the lease, recovery of any damage deposit less amounts retained under the damage deposit statute, and up to a $100 civil penalty.[342] The statute does not provide for enforcement through an eviction action defense.[343] However, the tenant can raise the issue when an eviction action is consolidated with a rent escrow or tenant remedies action.[344] Some local ordinances contain similar protections.[345]

12. Landlords' Actual, or Acquiescence in, Unlawful Activities

In 1997, the unlawful activities drug covenant, which then only applied to tenants, was expanded to cover landlords as well as tenants. Now, both the tenant and the landlord, as well as the licensor and licensee, covenant that neither will (1) unlawfully allow illegal drugs on the premises, the common area, or curtilage, (2) allow prostitution or prostitution-related activity to occur in the premises, common area, or curtilage, or (3) allow the unlawful use or possession of certain firearms in the premises, common area, or curtilage.[346] The parties also covenant that the common area and curtilage will not be used by them or persons acting under their

341. *Id.*, subdiv. 4.

342. *Id.*, subdiv. 6 (referencing §§ 504B.381, 504B.385, 504B.395, 504B.471).

343. *Id.*, subdiv. 2.

344. Smith v. Brinkman, No. HC-1000124900, slip op. at 4 (Minn. Dist. Ct. Mar. 8, 2000) (order dismissing the eviction action). In consolidated eviction and rent escrow actions, the court awarded $300 in civil penalties for landlord visits without notice in which he was rude toward the tenant and her daughter; landlord restrained from harassing tenant and household members; landlord allowed to enter only to make repairs with written twenty-four hours' notice. Tenants awarded costs, disbursements, and attorney's fees. *Id.* at 5.

345. *See, e.g.*, MINNEAPOLIS, MINN., CODE § 244.285 (2009), which provides that whenever a landlord or landlord's agent intends to enter the tenant's unit, the person entering the unit shall make a good faith and reasonable effort to notify the tenant beforehand. The ordinance also contains some exceptions, but is much less specific than the new statute. As a right protected by ordinance, a tenant could seek rent abatement for a landlord's violation of the ordinance, and in turn, violation of the covenants of habitability in Minnesota Statutes section 504B.161 (formerly codified at Minnesota statutes section 504.18 (1998)), the tenant could seek rent abatement. *See supra* notes 221–57 and accompanying text.

346. MINN. STAT. § 504.171 (2008), *amended by* 1997 Minn. Laws, ch. 239, Art 12, § 4 (formerly codified at MINN. STAT. § 504B.11).

control to carry out activities in violation of illegal drug laws.[347] While the tenant can enforce the covenant in a tenant remedies, rent escrow, or emergency action, a landlord's violation of the covenant may give rise to defenses in nonpayment of rent cases.[348]

13. Fair Debt Collection Practices Act Defenses

An eviction action "is equivalent to a demand for the rent" and a reentry upon the property, and gives rise to the tenant's right to redeem the property.[349] The Fair Debt Collection Practices Act (FDCPA) applies to some eviction actions for nonpayment of rent.[350] The Act applies to debt collectors, including attorneys who regularly engage in debt collection, collection agencies, creditors collecting for third parties, and creditors collecting under the name of another.[351] The Act does not apply to an officer or employee of the creditor collecting in the name of the creditor.[352] While the Act does not apply to landlords, their employees, or

347. *Id.* Neither of the drug covenants are violated if someone other than one of these parties possesses or allows illegal drugs on the property, unless the party knew or had reason to know of the activity. *Id.* The Legislature did not extend this part of the statute to the prostitution and firearms covenants. It is unclear whether that was intended or a drafting oversight. However, the fact that each of the covenants uses the word "allow" suggests that the test for liability is whether the party was directly involved or acquiesced in the conduct of others.

348. In a nonpayment of rent case, the tenant should have the remedy of rent abatement that is available for a landlord's violation of the only other implied lease covenants, the covenants of habitability under section 504B.161 (formerly codified at section 504.18 (1998)). The covenants are similar in that they deal with basic issues of safety and security. The Legislature has created the same enforcement mechanisms for them in the tenant remedies statutes, which also are part of the eviction chapter. Even before full extension of the covenants to landlords, the tenant could claim that the landlord's failure to remove unlawful activities from the building violated the tenant's right to quiet enjoyment. Ricke v. Villebrun, No. UD-1961112566, slip op. at 4–5 (Minn. Dist. Ct. Dec. 5, 1996) (order denying plaintiff's unlawful detainer action and awarding defendant a rent abatement). In *Ricke*, the court stated that every lease contains the right of quiet enjoyment, and a landlord's failure to remove a known risk created by illegal drug activity violated this covenant of quiet enjoyment. *Id.* at 3–4. The court then ordered the landlord to notify the court of immediate and continuing steps to enforce the right to quiet enjoyment, and provided that the tenants may pay rent into the court if the landlord does not take such continuing steps. *Id.* at 5–6.

349. MINN. STAT. § 504B.291, subdiv. 1 (2008) (formerly codified at MINN. STAT. § 504.02 (1998)). *See supra* notes 330–37 and accompanying text (discussing redemption).

350. 15 U.S.C. § 1692 (2006).

351. *Id.* § 1692a(6).

352. *Id.* § 1692a(6)(A).

managing agents for landlords, it does apply to attorneys who regularly engage in debt collection, and landlord agents who do not manage the property and regularly collect debts or commence eviction actions for nonpayment of rent.[353]

The Act's application is triggered by a communication regarding the debt. An exception is an eviction complaint, which does not trigger the Act's protections.[354] However, there are other communications in an eviction that would do so. The term "communication" means the "conveying of information regarding a debt directly or indirectly to any person through any medium."[355] If the debt collector's initial communication is a written notice for nonpayment of rent, as opposed to a pleading for nonpayment of rent, the notice must state what is often called the "mini-Miranda warning": "that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose . . . ."[356] Section 1692g(a) adds:

> Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing . . .
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector; [and]
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector . . . .[357]

If the debt collector's initial communication is a pleading for nonpayment of rent, the "mini-Miranda warning" does not apply,[358]

353. Hodges v. Sasil Corp., 915 A.2d 1 (N.J. 2007) (stating that law firm and attorneys that regularly filed summary dispossess actions for nonpayment of rent were considered debt collectors subject to the FDCPA).

354. *See* 15 U.S.C. § 1692g(d).

355. *Id.* § 1692a(2).

356. *Id.* § 1692e(11).

357. *Id.* § 1692g(a).

358. *Id.* § 1692e(11).

but the section 1692g(a) notice and protections still apply.[359] If within thirty days of receiving the required notice, the consumer disputes the debt or requests verification of the debt or the name of the original creditor, the collector must stop collection activity until the information is provided in writing.[360] Violation of the Act can create liability for actual damages, additional damages up to $1,000, and costs and attorney fees.[361]

While the Act has been applied to eviction cases outside Minnesota, there are no reported Minnesota decisions on the issue.[362] In Minnesota, most nonpayment of rent eviction actions do not require notice before commencing the action, and few landlords voluntarily give such notice. However, notice is required in most public and subsidized housing programs, and in mobile home park lot tenancies.[363] Violations of the Act in the required pre-commencement notice should result in dismissal, as in the New York cases, since the notice violates federal law. In eviction actions where no advance notice is given, the court should also dismiss the action if the plaintiff does not provide the section 1692g(a) notice. Where the plaintiff complies with the notice provisions, if the tenant disputes the debt or requests verification of the debt or the name of the original creditor, the court should continue the hearing until the information is provided in writing. In most cases, it should take the collector little time to supply the information.

14. Joint Liability Only if Provided in Lease

Many housing attorneys, including the author, have interpreted state law as requiring joint liability among co-tenants.

359. *Id.* § 1692g(d).
360. *Id.* § 1692g(b).
361. *Id.* § 1692k(a).
362. In *Romea v. Heiberger & Associates*, the landlord's attorneys gave the state required nonpayment of rent notice and then commenced an eviction action. 163 F.3d 111, 113 (2d Cir. 1998). The tenant sued in federal court in New York, challenging the notice under the Act. *Id.* The attorneys moved to dismiss. *Id.* at 114. The district court denied the motion, holding that the FDCPA applied to the attorney's letter. *Id.* The Second Circuit affirmed, holding that back rent was "debt" within the meaning of the FDCPA, the notice was a "communication" to collect a debt, within the meaning of the FDCPA, and the attorneys were acting as "debt collectors" for FDCPA purposes. *Id.* at 117–19. New York housing court decisions have dismissed eviction actions for violations of the Act. Eina Realty v. Calixte, 679 N.Y.S.2d 796, 801 (Civ. Ct. 1998); Dearie v. Hunter, 676 N.Y.S.2d 896, 898 (Civ. Ct. 1998).
363. See *infra* notes 439–51 and accompanying text.

That may not be the case. The statute states:

> Every person in possession of land out of which any rent is due, whether it was originally demised in fee, or for any other estate of freehold or for any term of years, shall be liable for the amount or proportion of rent due from the land in possession, although it be only a part of the land originally demised. Such rent may be recovered in a civil action, and the deed, demise, or other instrument showing the provisions of the lease may be used in evidence by either party to prove the amount due from the defendant. Nothing herein contained shall deprive landlords of any other legal remedy for the recovery of rent, whether secured to them by their leases or provided by law.[364]

The case law indicates that the statute, which was based on a Massachusetts statute, did not create new liability between tenants and landlords, but did protect the landlord from losing the right to collect rent where the tenant assigned his/her interest to two or more persons.[365] Under Minnesota Statutes section 504B.125, each tenant or assignee is liable only for the reasonable value of her physical share of the property, unless the lease creates joint liability, and each tenant or assignee is liable only for the time he occupies the property, unless the lease creates liability past the date occupancy ends.[366]

15. Foreclosure of Residential Rental Property

The relationship between the landlord and tenant is not changed during the mortgage foreclosure process.[367] Since the mortgagor remains the owner of the property until the end of the

364. MINN. STAT. § 504B.125 (2008) (formerly codified at MINN. STAT. § 504.04 (1998)).

365. Baehr v. Penn-O-Tex Oil Corp., 104 N.W.2d 661, 663–64 (1960); McLaughlin v. Minn. Loan & Trust Co., 255 N.W. 839, 840 (1934); Minn. Loan & Trust v. Med. Arts Bldg., 255 N.W. 85, 86 (1934); Campbell v. Stetson, 43 Mass. (2 Met.) 504, 505 (1841).

366. *See generally* Letter from Paul Birnberg, Staff Attorney, Community Action for Suburban Hennepin, to Lawrence McDonough and Mike Vraa, Legal Aid Society (Jan. 15, 1998) (on file with author) (citing MINN. STAT. § 504.04 (1996) (currently codified at § 504B.125 (2008)). Since the statute does not contain a non-waiver clause, the parties may be free to contract for join liability.

367. Mortgage foreclosures are governed by Minnesota Statutes sections 580–582 (2008).

redemption period,[368] the tenant remains liable for the rent and other obligations under the lease and landlord tenant laws, and the landlord remains obligated to maintain the property and comply with the lease and landlord tenant laws.

Prior to August 1, 2008, if the landlord wanted to rent the property to a new tenant during the foreclosure process, the landlord only could "enter into a periodic residential lease agreement with a term of two months or less or a fixed term residential tenancy not extending beyond the cancellation period or the landlord's period of redemption."[369] However, the restriction no longer applied if "the mortgage default has been cured and the mortgage reinstated; the mortgage has been satisfied; the property has been redeemed from a foreclosure sale; or a receiver has been appointed."[370] Landlords had no obligation to disclose to prospective tenants that the property was in foreclosure and that the tenant might have to move again within months of entering the lease.

Landlords are now required by statute to notify a prospective tenant in writing that the property is in foreclosure and may not accept rent or a deposit before giving notice.[371] If the landlord and tenant then enter into a lease, the lease is limited to the time in which the landlord continues to own the property.[372] The statute does not apply if the foreclosing entity agrees to honor the lease after the landlord's ownership interest expires.[373] While the statute does not contain a penalty for violations,[374] tenants should argue that a violation of the disclosure requirement renders the lease illegal and void, entitling a tenant to a full abatement of rents illegally obtained.[375]

Also beginning August 1, 2008, a tenant in the last month of the foreclosure redemption period may now withhold the rent and have the deposit cover it.[376] Following expiration of the redemption period, the foreclosing bank steps into the shoes of the

368. § 580.23.
369. *Id.* § 504B.151 (2006).
370. *Id.*, subdiv. 1.
371. *Id.*, subdiv. 1(b) (2008).
372. *See id.*, subdiv. 1(a).
373. *See id.*, subdiv. 2.
374. *Id.* § 504B.151.
375. *See supra* notes 258–69 and accompanying text (discussing dwelling licenses).
376. § 504B.178, subdiv. 8 (formerly codified at § 504A.241, subdiv. 6 (1998)).

landlord as the owner of the property until the bank terminates the tenancy.[377]

E. Holding Over After Notice to Quit Defenses

1. Improper Notice to Quit

A tenant can terminate a month-to-month tenancy by giving written notice before the last month of the tenancy.[378] Notice must be served and received before the first day of the month in which the tenancy is to terminate.[379] The notice must state a termination date before rent is due.[380] If the notice states the date on which rent is due, then the tenancy would start another month and would not be terminated.[381] Strict compliance is required.[382] A defective notice is void and does not become effective at the end of the next month.[383]

Term leases may provide for notice to terminate the lease before the end of the term. Failure to give the notice requires dismissal.[384] Some leases do not grant the landlord the right to terminate the lease by notice without cause.[385]

377. See *supra* notes 367–68 and accompanying text.

378. Johnson v. Hamm Brewing Co., 213 Minn. 12, 16, 4 N.W.2d 778, 781 (1942).

379. Oesterreicher v. Robertson, 187 Minn. 497, 501, 245 N.W. 825, 826 (1932); Coker v. Hulsey, No. UD-1991101520, slip op. 1–2 (Minn. Dist. Ct. Nov. 12, 1999) (decision and order) (finding that notice must be actually received before October 1 to terminate lease at the end of October, and also finding notice to quit sent by registered mail on September 29 resulting in failed deliveries on October 1 and October 6 was untimely).

380. *Oesterreicher*, 187 Minn. at 499, 245 N.W. at 825.

381. *See id.* at 501, 245 N.W. at 826.

382. Markoe v. Naiditch & Sons, 303 Minn. 6, 7, 226 N.W.2d 289, 290 (1975).

383. Eastman v. Vetter, 57 Minn. 164, 166, 58 N.W. 989, 989–90 (1894); Minneapolis Pub. Hous. Auth. v. Papasodora, No. UD-1960611515, slip op. at 5 (Minn. Dist. Ct. July 17, 1996) (decision and order).

384. Oisuji v. Coleman, No. HC-01991118524, slip op. at 2 (Minn. Dist. Ct. Nov. 30, 1999) (order dismissing action) (involving situation where landlord failed to provide written notice as required by the lease, and failed to abide by the terms of the notice).

385. Valley Manor Apartments v. Gullickson, No. CX-94-10, slip op. at 1–2 (Minn. Dist. Ct. Feb. 3, 1994) (order denying plaintiff's unlawful detainer complaint) (stating that "since this is a written lease that does not grant the owner the right to terminate the lease at will without other reason, the timeliness of notice issue is not relevant.").

2. Notice to Tenants in Residential Rental Property in Mortgage Foreclosure or Contract for Deed Cancellation

When rental property is in foreclosure, if the landlord does not redeem the mortgage, then at the end of the redemption period the purchaser at the sale (most often the mortgagee) becomes the owner of the property.[386] The purchaser cannot terminate a tenancy that preceded the mortgage.[387] Similarly, when the vendor cancels a contract deed and the vendee does not cure the default, the vendor becomes the owner of the property at the end of the cancellation period.[388]

Prior to August 1, 2008, the purchaser of foreclosed property or the vendor of a cancelled contract for deed could terminate the tenancy, which postdated the mortgage by giving the tenant one month's written notice at or after the end of the redemption on cancellation period.[389] If the tenant did not pay rent or breached the lease during the notice period, the purchaser or vendor could file an eviction action against the tenant without waiting for the vacate date in the notice.[390] Alternatively, the purchaser or vendor could give one month's written notice during the redemption period to be effective during or at the end of the redemption or cancellation period, but notice had to state that the purchaser would "hold the tenant harmless for breaching the lease by vacating the premises if the mortgage is redeemed or the contract is reinstated."[391] In *Broszko v. Principal Mutual Life Insurance Co.*, the Minnesota Court of Appeals interpreted the eviction notice statute as *not* applying to tenants who began renting the property during the redemption period.[392]

386. *See* MINN. STAT. § 580.23 (2008) (discussing redemption of land).

387. *See* Claflin v. Commercial State Bank of Two Harbors, 487 N.W.2d 242 (Minn. Ct. App. 1992) (holding that actual and open possession of property was sufficient to put mortgage lender on inquiry notice of possible tenancy rights in the property).

388. MINN. STAT. § 559.21 (2004 & Supp. 2005).

389. § 504B.285, subdiv. 1 (2006).

390. *Id.*

391. *Id.*, subdiv. 1(ii)(B).

392. 533 N.W.2d 656 (Minn. Ct. App. 1995). The court held that persons who began occupying foreclosed property beginning late in the redemption period were not tenants of the bank at the end of the redemption period. *Id.* at 659. The court stated that the mortgagor does not have the power to create a tenancy in the redemption period which extends beyond the redemption period, after which any

The 2008 Minnesota Legislature amended the statute to overrule *Broszko* and require a longer notice.[393] The purchaser or vendor now must give a two month's notice to tenants who reside in the property during the redemption or cancellation period and who entered into a lease after the mortgage foreclosure commencement notice.[394] The statute retains the two options for what used to be a one month's notice[395] and now is a two month's notice: (1) written notice at or after the end of the redemption or cancellation period, or (2) written notice during the redemption or cancellation period to be effective during or at the end of the redemption or cancellation period, but notice must still state that the purchaser would "hold the tenant harmless for breaching the lease by vacating the premises if the mortgage is redeemed or the contract is reinstated."[396] While the language of the amendment might lead purchasers to argue that the notice is not required for leases that predate the foreclosure or cancellation notice, tenants should argue that it applies to leases that are renewed or continued during the redemption period. The author expects the 2009 Minnesota Legislature to clarify the notice requirement.

3. Retaliatory Eviction

Minnesota Statutes section 504B.285, subdivision 2 states:

> Retaliation Defense. It is a defense to an action for recovery of premises following the alleged termination of a tenancy by notice to quit for the defendant to prove by a fair preponderance of the evidence that:

tenant of the mortgagor becomes a trespasser. *Id.* at 658–59. The court noted that (1) the person did not have a lease; (2) did not pay rent for the last half year; (3) knew foreclosure was taking place and that they would have to move; (4) knew the date of the end of the redemption period; (5) was served with process by substitute service; and (6) did not attend the hearing and then later contacted the bank's attorney to ask when she had to leave, giving the bank its first notice of her presence on the property, and did not attempt to reopen the unlawful detainer action, but rather sued after execution of the writ of restitution. *Id.* at 656–58. The broad holding limited application of the statute to persons who began renting from the mortgagor before the foreclosure sale, giving no protection to the large number of persons who rent from mortgagors during the redemption period. *See id.* at 656–60.

393. *See* MINN. STAT. § 504B.285, subdiv. 1 (2008) (amending § 504B.285, subdiv. 1 (2006)).

394. *Id.*

395. § 504B.285, subdiv. 1 (2006).

396. § 504B.285, subdiv. 1(ii)(B) (2008) (formerly codified at § 566.03, subdiv. 1 (1998)).

> (1) the alleged termination was intended in whole or part as a penalty for the defendant's good faith attempt to secure or enforce rights under a lease or contract, oral or written, under the laws of the state or any of its governmental subdivisions, or of the United States; or
>
> (2) the alleged termination was intended in whole or part as a penalty for the defendant's good faith report to a governmental authority of the plaintiff's violation of a health, safety, housing, or building code or ordinance.

If the notice to quit was served within ninety days of the date of an act of the tenant coming within the terms of clause (1) or (2), the burden of proving that the notice to quit was not served in whole or part for a retaliatory purpose rests with the plaintiff.[397]

The leading case interpreting the retaliation provisions of Minnesota Statutes section 566.03, the predecessor of Minnesota Statutes section 504B.285, is *Parkin v. Fitzgerald*.[398] After reviewing standards applied in other jurisdictions, the court adopted the following standard for trial courts to use in determining whether a landlord satisfied the burden of proving a non-retaliatory purpose:

> A landlord must establish by a fair preponderance of the evidence a substantial non-retaliatory reason for the eviction, arising at or within a reasonably short time before service of the notice to quit. A non-retaliatory reason is a reason wholly unrelated and unmotivated by any good-faith activity on the part of the tenant protected by the statute (e.g., nonpayment of rent, other material

397. *Id.* § 504B.285, subdiv. 2 (2008). Similarly, section 504B.441 (formerly codified at section 566.28, subdiv. 2 (1998)) states:

> A residential tenant may not be evicted, nor may the residential tenant's obligations under a lease be increased or the services decreased, if the eviction or increase of obligations or decrease of services is intended as a penalty for the residential tenant's or housing-related neighborhood organization's complaint of a violation. The burden of proving otherwise is on the landlord if the eviction or increase of obligations or decrease of services occurs within 90 days after filing the complaint, unless the court finds that the complaint was not made in good faith. After 90 days the burden of proof is on the residential tenant.

Residents of manufactured or mobile home park lots have similar protections. *Id.* § 327C.12.

398. 307 Minn. 423, 240 N.W.2d 828 (1976) (citing § 566.03 (1976)) (current version at § 504B.285 (2008).

> breach of covenant, continuing damage to premises by tenants, or removal of housing unit from market for a sound business reason). Such a standard will give full protection to tenants and will enhance the legislative policy of liberal construction of statutory covenants to insure adequate housing.[399]

The court added, "even a legitimate business purpose must be closely examined to ensure that it is not contrived or colored in any way by the tenants' protected activities."[400] Where the landlord establishes a substantial non-retaliatory purpose, the tenant should "have an opportunity to rebut this by showing that the allegedly non-retaliatory purpose was actually a pretext used as a 'cover' for retaliation."[401]

4. Waiver of Notice

There is disagreement over when payment and acceptance of rent waives a notice to quit. Landlords argue that acceptance of rent does not necessarily manifest the intent to waive notice.[402] Tenants argue that the payment and acceptance of rent constitutes

399. *Id.* at 430–31, 240 N.W.2d at 832–33 (citations omitted).

400. *Id.* at 430, 240 N.W.2d at 832. *See* Walters v. Demmings, No. C4-01-2, 2001 WL 641753 (Minn. Ct. App. June 12, 2001) (order rescheduling for compliance hearing) (reversing eviction where the landlord raised a purpose "in the closing argument, not while he was under oath as a witness"). The trial court required the tenant to prove retaliation even through the tenant had enforced rights within ninety days of the notice to vacate, and the landlord only made the conclusory statement that "the rent was below market value and he was losing money on the property." *Id.* at *1. The landlord, however, "offered no details or documentary support for that conclusion." *Id.* at *3. *See also* City View Apartments v. Sanchez, No. C2-00-313, 2000 WL 1064897, at *3 (Minn. Ct. App. Aug. 1, 2000) (decision and order) (reversing and remanding the trial court judgment for the landlord where the trial court's order did not reflect analysis of the *Parkin* standard, and did not contain the requisite findings of fact) (citing *Parkin v. Fitzgerald*, 307 Minn. 423, 240 N.W.2d 828 (1976)); Payne v. REDACTED, No. HC-1010801519 (Minn. Dist. Ct. Aug. 22, 2001) (decision and order) (finding that presumption of retaliation applied even though tenant called for housing department inspection after notice was given, but had complained to landlord before notice was given; landlord failed to rebut presumption where rent payment history and clogged toilet problems paled in comparison to seriousness of habitability problems; expungement granted).

401. Barnes v. Weis Mgmt. Co., 347 N.W.2d 519, 522 (Minn. Ct. App. 1984).

402. Minneapolis Cmty. Dev. Agency v. Powell, 352 N.W.2d 532, 534 (Minn. Ct. App. 1984) (citing Arcade Inv. Co. v. Gieriet, 99 Minn. 277, 279, 109 N.W. 250, 252 (1906)); Burlington Coat Factory of Minn., LLC v. Chapman, No. A07-1456, 2008 WL 4006736, at *2 (Minn. Ct. App. Sept. 2, 2008).

unconditional waiver of a notice to quit.[403] Landlords have had mixed results in avoiding the waiver defense by not cashing rent payments and then arguing that they had not accepted rent.[404] In public and subsidized housing, the landlord's acceptance of the government subsidy, or housing assistance payment (HAP), does not waive the notice.[405] In mobile home park lot tenancies, acceptance of rent (1) after notice of violations or repeated serious violations of park rules or certain laws, or notice of park improvements or closure, does not waive the notice, or (2) a period after expiration of a final notice to quit waives the notice, unless the parties agree otherwise in writing.[406]

If a landlord gives a second notice to quit, the landlord automatically waives the right to proceed under the first notice.[407]

403. King v. Durkee-Atwood, Co., 126 Minn. 452, 455, 148 N.W. 297, 298 (1914) (regarding waiver of tenant's notice); Pappas v. Stark, 123 Minn. 81, 83, 142 N.W. 1046, 1047 (1913) (regarding waiver of landlord's notice); Linden Corp. v. Simard, No. C3-87-1599, 1988 WL 87503, at *2 (Minn. Ct. App. Feb. 9, 1988) (order reversing unlawful detainer writ of restitution) (analyzing waiver of notice, but citing waiver of breach cases; while it is questionable whether receipt of a check without cashing it constitutes waiver, receipt of a money order or cash constitutes waiver of notice). None of these cases discusses a requirement to show intent.

404. Carriage House Apartments v. Stewart, No. UD-1970107501, slip op. at 8–9 (Minn. Dist. Ct. May 13, 1997) (order granting plaintiff restitution) (stating that there is no waiver of notice or breach where landlord received but did not cash, deposit, or return money orders for rent; landlord instructed agents to not accept rent on the tenant's account; and landlord alleged tenant started a fire at the apartment). *But see* Aadland v. Jackson, No. UD-1991101616, slip op. at 2 (Minn. Dist. Ct. Nov. 19, 1999) (order dismissing plaintiff's complaint) (deciding that landlord's retention of November rent without cashing it waived notice to quit effective October 31, as the landlord exercised "dominion and control over the funds to the prejudice of the tenant").

405. Westminster Corp. v. Anderson, 536 N.W.2d 340, 342–43 (Minn. Ct. App. 1995). Where the landlord accepts the tenant's rent, regardless of whether the landlord accepted the HAP, waiver has occurred. *Id.*

406. MINN. STAT. § 327C.11, subdiv. 2 (2008). In *Lea v. Pieper*, the court held that rent received before expiration of the notice to quit, but covering a period extending beyond the expiration date, waived the notice. 345 N.W.2d 267, 271 (Minn. Ct. App. 1984). It appears that where a notice of violations includes a notice to vacate, it will be treated as a final notice for purposes of waiver. *See* Rainbow Terrace, Inc. v. Hutchens, 557 N.W.2d 618, 620 (Minn. Ct. App. 1997) (deciding that (1) Minnesota Statutes section 327C applies to mobile home park lot tenancies, regardless of whether the parties have a written lease; (2) acceptance of rent after expiration of a notice to vacate waived the notice; and (3) notice to quit was invalid because it did not state the reason for termination, depriving the tenants of an opportunity to remedy the violation) (citing section 327C.11 (1996)).

407. *Arcade Inv. Co.*, 99 Minn. at 279, 109 N.W. at 250 (1906) (citing Morgan v.

If the landlord subsequently agrees to a continuance of possession of the premises, as in executing a new lease, the landlord waives the effect of the notice.[408]

A landlord may also waive a notice by demanding subsequent rent in an eviction action. An eviction action based upon nonpayment of rent "is equivalent to a demand for the rent."[409] Generally, the defendant can redeem by paying the rent, interest, costs, $5 in attorney's fees, and performing other lease covenants until the court issues an order dispossessing the tenant and permitting reentry by the landlord.[410] An eviction action based upon both notice to quit and nonpayment of rent accrued after the notice creates the right to redeem the tenancy, and redemption waives the notice to quit.[411] In 1993, the Minnesota Legislature amended the redemption statute to allow landlords to plead nonpayment of rent and breach of lease claims alternatively.[412] The statute did not authorize alternative pleading of nonpayment of rent and holding over after notice to quit.[413] While the Legislature originally considered a bill that would have allowed landlords to plead nonpayment of rent and claims on other grounds,[414] the final statute limited alternative pleading to nonpayment of rent to only breach of lease.[415] Based on the statute, legislative history, and case law, the landlord's claim of nonpayment of rent along with holding

Powers, 31 N.Y.S. 2d 954 (1894); Dorkrill v. Schenk, 37 Ill. App. 44 (1890)); Ewing Square Assocs. v. Koerner, No. UD-2910104802, slip op. at 3, 8–9 (Minn. Dist. Ct. Feb. 4, 1991) (order granting defendant's motion to dismiss) (granting motion on basis of "plaintiff's failure to comply with required procedures in the service of the termination notice and unlawful detailer summons and complaint.").

408. *Arcade Inv. Co.*, 99 Minn. at 279, 109 N.W. at 251; Hegg v. Martinez, UD-1951206549, slip op. at 2 (Minn. Dist. Ct. Jan 19, 1996) (order granting rent abatement) (holding waiver of notice by agreeing to extend notice).

409. MINN. STAT. § 504B.291, subdiv. 1 (2008) (formerly codified at MINN. STAT. § 504.02, subdiv. 1 (1998)).

410. *Id.*

411. Stevens Ave. Ltd. P'ship v. Hodge, No. UD-1891108521, slip op. at 2 (Minn. Dist. Ct. Nov. 21, 1989) (order dismissing nonpayment of rent action) (holding that acceptance of rent waives any claim of notice to quit and known lease violations).

412. MINN. STAT. § 566.03, subdiv. 5(a) (Supp. 1993) (current version at MINN. STAT. § 504B.285, subdiv. 5(a) (2008)).

413. *See* § 504.02 (Supp. 1993) (current version at § 504B.291 (2008)); § 566.03, subdiv. 5(a) (Supp. 1993) (current version at § 504B.285, subdiv. 5(a) (2008)).

414. H.F. 1058, 1996th Leg., 78th Sess. (Minn. 1993).

415. STATE OF MINN. JOURNAL OF THE HOUSE, 78th Sess., at 701–02 (Mar. 25, 1993); STATE OF MINN. JOURNAL OF THE SENATE, 78th Sess., at 1809–10 (Apr. 15, 1993).

over after notice, grants the tenant the right to redeem the tenancy and waive the notice.[416]

5. Discrimination

Discrimination on the basis of the tenant's status as a member of a protected class is a defense to an eviction action.[417] The claim may be analyzed within the confines of the retaliatory eviction statute.[418] The defendant's "protected activity" is enforcement of the right to rent the premises without illegal discrimination.[419] If the notice to quit is served within ninety days of the defendant's protected activity, the plaintiff must establish by a fair preponderance of the evidence a substantial non-retaliatory purpose, arising at or shortly before the notice to quit, which is wholly unrelated to and unmotivated by the defendant's protected activity.[420] The defendant should have the right to rebut the allegedly non-retaliatory purpose by showing it actually was a pretext used as a cover for discrimination.[421]

6. Manufactured and Mobile Home Park Lot Tenancies

The tenancy may be terminated by the landlord only for cause.[422] Different notices are required, depending on the reason for the termination.[423]

7. Public and Government-Subsidized Housing

Notice requirements vary depending on the programs, but where the landlord is required to give notice, it must be written

416. *See generally infra* notes 402–16 and accompanying text.

417. Barnes v. Weis Mgmt. Co., 347 N.W.2d 519, 522 (Minn. Ct. App. 1984); *see* Ellis v. Minneapolis Comm'n on Civil Rights, 319 N.W.2d 702, 704 (Minn. 1982).

418. § 504B.285, subdiv. 2 (2008) (formerly codified at § 566.03 (1998)).

419. *See Barnes,* 347 N.W.2d at 522.

420. *Id.* at 521–22 (quoting Parkin v. Fitzgerald, 307 Minn. 423, 430–31, 240 N.W.2d 828, 831 (1976)).

421. *Id.* at 522. Tenants and tenants' counsel should carefully consider whether they can adequately prove discrimination in the limited time available to prepare for an eviction trial, because unsuccessful prosecution of the discrimination defense may preclude a subsequent discrimination lawsuit or administrative complaint with the United States Department of Housing and Urban Development, Minnesota Human Rights Department, or Minneapolis Civil Rights Department. *See Ellis,* 319 N.W.2d at 704.

422. MINN. STAT. § 327C.09, subdiv. 1 (2008).

423. § 327C.09. *See infra* notes 496–504 and accompanying text.

notice before commencement of an eviction action in all cases, even nonpayment of rent. In addition, good cause is required in most cases.

Section 8 existing housing voucher programs have the least regulated pre-eviction process.[424] Eviction of the tenant does not require termination of the tenant's rent subsidy. The tenant may be able to retain the subsidy and look for housing with another landlord who is willing to contract to receive the housing subsidy. However, the subsidy administrator, often called a Section 8 office or public housing authority, might try to terminate the tenant's subsidy for the same reasons the landlord tried to evict the tenant. These reasons can include failure to supply certain information to the housing authority, serious or repeated violation of the lease, drug-related or violent criminal activity, housing assistance fraud, and owing monies to the housing authority.[425] If the housing authority decides to terminate the tenant's housing subsidy, the housing authority must give written notice to the tenant and the right to contest the termination at an informal hearing.[426] In *Carter v. Olmstead County Housing and Redevelopment Authority*, the court of appeals closely reviewed the lay hearing officer's determination to terminate the Section 8 voucher.[427] The court concluded that the

424. The eviction summons and complaint satisfies the requirements of notice. *See* Eden Park Apartments v. Weston, 529 N.W.2d 732, 734 (Minn. Ct. App. 1995); 24 C.F.R. § 982.310(e) (2008). During the first year of the lease, the landlord cannot evict the tenant for a business or economic reason, as opposed to the tenant's violation of the lease. *See id.* § 982.310(d)(2). Mortgage foreclosure might not terminate the Section 8 contract. *See* Webster Bank v. Occhipinti, No. CV-9700591475, 1998 WL 846105, at *3–4 (Conn. Super. Ct. Nov. 20, 1998) (order dismissing motion to open judgment of strict foreclosure) (finding that Section 8 law preempted state mortgage foreclosure law and foreclosing mortgagee or the purchaser at the foreclosure sale could terminate the Section 8 lease only in accordance with the Section 8 statutes and regulations); Bristol Sav. Bank v. Savinelli, No. CV-950377478S, 1996 WL 166396, at *2 (Conn. Super. Ct. Mar. 21, 1996) (finding that Section 8 tenancy survived automatic termination by foreclosure).

425. *See* 24 C.F.R. § 982.551–.553. The agency "must terminate program assistance for a family evicted from housing assisted under the program for serious violation of the lease." *Id.* § 982.552(b)(2); Wilhite v. Scott County Hous. & Redevelopment, 759 N.W.2d 252, 255 (Minn. Ct. App. 2009) (finding that failure to vacate a leased residential premises upon the expiration of the lease constitutes a serious lease violation mandating the termination of assistance); Cole v. Metro. Council HRA, 686 N.W.2d 334, 337 (Minn. Ct. App. 2004) (finding that HRA must terminate Section 8 benefits for a family evicted for a serious violation of the lease, regardless of whether the decision was by default).

426. 24 C.F.R. § 982.555.

427. 574 N.W.2d 725, 733 (Minn. Ct. App. 1998).

officer's findings were insufficient and failed to mention or explain the basis for failing to credit evidence in support of the tenant's claim, and the housing authority failed to prove substantial evidence to sustain the termination.[428]

HUD-subsidized projects or apartment buildings are more regulated, and include the right to a pre-eviction notice and meeting.[429] The Rural Housing and Community Development Service (RHCDS) subsidizes projects and apartment buildings in rural areas. RHCDS projects are the most regulated of the privately owned and federally subsidized rental housing.[430] State law also

428. *Id.* *See also* Pittman v. Dakota County Cmty. Dev. Agency, No. 07-2063, 2009 WL 112948, at *4 (Minn. Ct. App. Jan. 20, 2009) (holding agency failed to make findings of fact to support its decision to terminate benefits and the legal basis for termination was unclear); Rinzin v. Olmsted County Hous. & Redevelopment Auth., No. A07-2344, 2008 WL 4977576, at *4 (Minn. Ct. App. Nov. 25, 2008) (holding hearing officer's decision to revoke the voucher was unsupported by substantial evidence). *See generally* Edgecomb v. Hous. Auth. of Vernon, 824 F. Supp. 312 (D. Conn. 1993).

429. *See* HUD HANDBOOK NO. 4350.3, *supra* note 293, at 8-17(d). HUD Handbook No. 4350.3 regulates cost HUD-subsidized projects or apartment buildings. The notice to vacate must state that the tenancy is terminated on a specific date, state the reasons for the eviction with sufficient specificity to enable the tenant to prepare a defense, advise the tenant that if a judicial action for eviction is instituted the tenant may present a defense, state that the landlord may seek to enforce the termination only by bringing a judicial action, and advise the tenant that the tenant has ten days in which to discuss the proposed termination of the tenancy with the landlord. 24 C.F.R. § 247.4(a); *see also* HUD HANDBOOK NO. 4350.3, *supra* note 293, at 8-11(c). There is no exception to the notice requirement. Sentinel Mgmt. Co. v. Kraft, No. UD-1920806546, slip op. at 3 (Minn. Dist. Ct. Aug. 12, 1992) (order). The complaint in the eviction action may not rely on any grounds that are different from the reasons set forth in the termination letter, except that the landlord is not precluded from relying on grounds of which the landlord had no knowledge at the time the termination letter was sent. *See* 24 C.F.R. § 247.6(b). Moderate rehabilitation projects are subsidized by HUD but are covered by the handbook. The landlord must serve the tenant a written notice of lease termination stating that the date the tenancy shall terminate and the reasons for termination with enough specificity to enable the tenant to prepare a defense, and advise the tenant that if a judicial proceeding is instituted, the tenant may present a defense at the proceeding. *Id.* § 882.511(d); Project for Pride in Living v. Kvanli, No. UD-1930122520, slip op. at 3 (Minn. Dist. Ct. Feb. 11, 1993) (order dismissing action) (finding that landlord's letter asking tenant to re-tender rent payment did not terminate tenancy). Another subsidized housing program is operated under the tax code. In *Cimarron Village Townhomes, Ltd. v. Washington*, the court of appeals ruled that Section 42 low income tax credit tenancies could not be terminated without cause. No. C3-99-118, 1999 WL 538110, at *2 (Minn. Ct. App. July 27, 1999). *See also* 26 U.S.C. §§ 42(h)(6)(B)(i), (E)(ii)(I) (2006).

430. The landlord may not evict the tenant without cause. 7 C.F.R. § 3560.159(a) (2008). The landlord must give a notice of lease violation before

provides for a pre-eviction notice in subsidized housing.[431] Public housing has the most highly regulated eviction procedure.[432] Most public and subsidized housing programs allow the tenant to terminate the tenancy with a notice to quit. If the tenant voluntarily gave such notice or is coerced into doing so and then withdraws or revokes the notice, the landlord may have to comply with the eviction notice requirements rather than simply rely on

issuing a lease termination notice. *Id.* If the tenant does not correct the violation, the landlord must give the tenant written notice to end the lease. *See id.* The notice must state:

> (1) [a] specific date by which lease termination will occur; (2) [a] statement of the basis for lease termination with specific reference to the provisions of the lease or occupancy rules . . .; and (3) [a] statement explaining the conditions under which the borrower may initiate judicial action to enforce the lease termination notice.

Id. § 3560.159(b). Landlords participating in the program must comply with the statutory and regulatory requirements of the program. Hoglund-Hall v. Kleinschmidt, 381 N.W.2d 889, 895 (Minn. Ct. App. 1986). In *Hoglund-Hall*, the court of appeals reversed the district court decision for eviction of the tenant under the predecessor to the RHCDS, the Farmers Home Administration (FmHA). *Id.* The court held that while the district court's finding that the tenant's occupancy threatened the safety of other tenants and management was not clearly erroneous, the landlord's failure to follow the notice requirements of the program required reversal. *Id.* at 895–96. The court concluded that the federal requirements applied, even if they were not included in the lease. *Id.* at 894.

431. Under state law, the subsidized housing owner must give the tenant a one year's notice for (1) expiration of the Section 8 contract, (2) owner termination or non-renewal of a Section 8 contract or mortgage, (3) owner prepayment of a mortgage that would terminate federal housing use restrictions, or (4) owner termination of a housing subsidy program. MINN. STAT. § 504B.255 (2008) (formerly codified at MINN. STAT. § 504.32 (1998)). The owner must give the notice at commencement of the lease if any of these events would occur in less than a year. *Id.* In *Occhino v. Grover*, the court held that the requirement for one year's notice to terminate subsidized housing leases under Minnesota Statutes section 504B.255 applies to subsidized projects, but not portable Section 8 assistance. 640 N.W.2d 357, 362 (Minn. Ct. App. 2002).

432. The public housing authority (PHA) may not evict the tenant without cause. 24 C.F.R. § 966.4(l)(2). The PHA must give a written lease termination notice. *Id.* § 966.4(l)(3)(i). The landlord must give either thirty days' notice, fourteen days' notice for nonpayment of rent, or a reasonable time for a health or safety threat. In most cases, the notice must offer a grievance procedure. *Id.* § 966.4(l)(3)(iii). The public housing authority can bypass the grievance process where the eviction was for criminal activity or drug-related criminal activity; HUD has determined that an eviction case meets HUD requirements for due process, which HUD has certified. *Id.* §§ 966.4(l)(3)(v), 966.4(m). The grievance process includes an informal conference. Dial v. Star City Pub. Hous. Auth., 648 S.W.2d 806, 807 n.1 (Ark. Ct. App. 1983); 24 C.F.R. § 966.54. The grievance process also includes an informal hearing. Edgecomb v. Hous. Auth. of Vernon, 824 F. Supp. 312, 313 (D. Conn. 1993); 24 C.F.R. §§ 966.55–.57.

the tenant's notice to quit.[433]

8. Tenant Revocation of Tenant's Notice to Quit

A tenant should be able to revoke his or her notice to quit, where the tenant and landlord did not make an oral or written contract for the tenant to move, and where the landlord has not relied on the notice to the landlord's detriment.[434]

9. Uniform Relocation Act

The Uniform Relocation Act provides for additional notice to tenants where they are to be displaced as a result of receipt of state or federal monies.[435] In *Project for Pride in Living, Inc. v. McCoy*, the owner obtained a loan with the Minnesota Housing Finance Agency for purchase and rehabilitation of the property.[436] The owner then gave thirty days' notice to quit without alleging good cause for the termination.[437] The tenant did not receive any notices

433. In *Dakota County HRA v. Blackwell*, the tenant requested an extension of a lease termination date by half a month, to which the landlord agreed. No. C7-98-1763, 1999 WL 262088, at *1 (Minn. Ct. App. May 4, 1999), *rev'd*, 602 N.W.2d 243 (Minn. 1999). Before the date passed, the tenant rescinded the agreement and the landlord filed an eviction action. *Id.* at *2. The trial court held that the tenant did not violate her lease, but awarded the landlord specific performance for the tenant's failure to move. *Id.* at *2–3. The court of appeals affirmed, concluding that there was consideration for the agreement. *Id.* at *7. The court rejected the tenant's claims of mistake, unconscionability, and public policy, and held that specific performance was an appropriate remedy. *Id.* Judge Foley argued in dissent that specific performance rendering the tenant homeless ignored equity. *Id.* The Minnesota Supreme Court reversed in *Dakota County HRA v. Blackwell*, concluding that the district court abused its discretion in awarding specific performance. 602 N.W.2d 243, 245 (Minn. 1999). The court noted that a party does not have an automatic right to specific performance for breach of contract, and the district court must balance the equities and determine whether the equitable remedy is appropriate. *Id.* The court added that its decision was limited to the facts presented. *Id.* *See Hoglund-Hall*, 381 N.W.2d at 895 (holding that tenant's notice to quit was not an effective waiver of rights, and subsequent letter stating that tenants would remain placed burden back on landlord to restart federally regulated eviction process).

434. Cent. Manor Apartments v. Beckman, Nos. UD-1980609509, UD-1980513525, slip op. at 5 (Minn. Dist. Ct. July 29, 1998) (order denying plaintiff's claim for relief) (stating that tenant effectively retracted tenant's notice to quit prior to acceptance of landlord or any detrimental reliance by landlord).

435. 42 U.S.C. § 4621, *et seq.* (2008).

436. No. C7-99-4197 (Minn. Dist. Ct. Aug. 31, 1999) (order affirming dismissal of unlawful detainer action) (finding that the district court's findings of fact were not clearly erroneous).

437. *Id.*

for noncompliance with her lease during her tenancy.[438] The housing court concluded that the Uniform Relocation Act applied since the owner executed a loan involving federal and state monies, and that the thirty days' notice to quit without cause violated the ninety days' notice requirement and the requirement of cause for eviction.[439]

F. Breach of Lease Defenses

1. No Right of Reentry Clause in the Lease

The landlord may not recover possession of the premises in an eviction action based upon alleged breaches of an oral or written lease, where the lease does not provide for the landlord's right to reenter and retake possession upon breach.[440] The requirement of having a right of reentry clause to commence an eviction action for breach of lease was confused by the unpublished decision in *C & T Properties v. McCallister*.[441] In *McCallister*, the court of appeals held that a right of reentry clause was not a precondition for an action for breach of lease, and concluded that a phrase in Minnesota Statutes section 566.03 (currently codified at section 504B.285 (2008)) essentially overruled earlier case law.[442] The statute set forth various grounds for subject matter jurisdiction in eviction actions, and following the section on retaliation stated "[n]othing contained herein shall limit the right of the lessor pursuant to the provisions of subdivision 1 [basis for subject matter jurisdiction] to terminate a tenancy for a violation by the tenant of a lawful, material provision of a lease or contract."[443] However, read in the context of the entire statute, the provision was intended to indicate that the anti-retaliation provision of the statute would not limit the right of the landlord to evict a tenant for a violation of the lease.[444]

438. *Id.*

439. *Id.*; 49 C.F.R. §§ 24.203, .206 (2008); MINN. STAT. §§ 117.51–.52 (2008).

440. Bauer v. Knoble, 51 Minn. 358, 359, 53 N.W. 805, 805 (1892); Salo v. Dodson, No. CX-96-600886, slip op. at 2 (Minn. Dist. Ct. July 2, 1996) (order granting motion for summary judgment) (finding that lease did not contain a right of reentry clause).

441. No. C9-98-940, 1999 WL 10262 (Minn. Ct. App. Jan. 12, 1999).

442. *Id.* at *1–2.

443. *Id.* at *2.

444. There is no indication that the Legislature intended to reverse *Bauer* in its re-codification of landlord-tenant statutes in chapter 504B. To the contrary, the comments of the drafting committee and testimony before the Legislature indicated that the drafters intended Bauer to remain good law. *See* Letter from

Trial courts have continued to follow the earlier case law.[445]

2. Implied Modification of the Lease or Waiver of Lease Provisions

In the absence of an express verbal agreement, subsequent acts and conduct of the parties may establish an implied waiver or modification of a lease term.[446] In *Northview Villa, M.H.P. (Sandpiper Bend) v. Gresens*, the tenants lived in a mobile home park for over five years with their cats.[447] Other tenants in the park also had pets.[448] The tenants testified that they discussed a "no pet" rule with the park manager, and said that they would lease the premises only if they could keep their cats.[449] The managers were aware that the tenants had cats, but continued to accept rent from the tenants without asking them to remove their cats, and without seeking to enforce the "no pet" rule for five years.[450] The court concluded that the trial court did not err in finding that this course of conduct established a waiver to the "no pet" rule.[451]

Paul Birnberg, Staff Attorney, Cmty. Action for Suburban Hennepin, to Lawrence McDonough and Mike Vraa, Legal Aid Society (Jan. 15, 1998) (on file with author).

445. O'Brian v. REDACTED, No. HC-1010402506 (Minn. Dist. Ct. Apr. 18, 2001) (decision and order) (involving breach claims dismissed where oral lease contained no right of reentry clause; notice claim dismissed where landlord failed to attach notice to complaint and failed to prove notice was given; and expungement granted); Lowe v. Cotton, No. UD-01990924515, slip op. at 1 (Minn. Dist. Ct. Oct. 7, 1999) (order dismissing breach of lease claim) (involving situation where there was no written lease, parties recently entered into a written agreement that defendant would not have a pet but the memo did not include a right of reentry); D & D Real Estate Inv. v. Hughes, No. UD-1990311505, slip op. at 2 (Minn. Dist. Ct. Mar. 30, 1999) (order dismissing breach of lease claim) (involving situation where there was no convincing evidence that the oral lease contained a right of reentry clause).

446. Mitchell v. Rende, 225 Minn. 145, 148–49, 30 N.W.2d 27, 29–30 (1947).

447. No. C9-90-175, 1990 WL 89450, at *1 (Minn. Ct. App. July 3, 1990).

448. *Id.*

449. *Id.*

450. *Id.*

451. *Id.*; *see also* Kostakes v. Daly, 246 Minn. 312, 318, 75 N.W.2d 191, 195 (1956) (holding landlord could not enforce non-assignment provision where landlord knew of assignment and investment by assignee of large sum of money in the property but took no action for three months); Garakani v. Five Lakes Centre, L.L.C., No. C7-96-673, 1996 WL 636213, at *1 (Minn. Ct. App. Nov. 5, 1996) (concluding that the parties did not modify, by their conduct, a notice requirement in the lease where lease contained clear notice and non-waiver clauses and past conduct did not indicate the lease would not be formally enforced).

3. Unilateral Modification of the Lease

A party may not enforce a unilateral modification of the lease. In *Commonwealth Terrace Cooperative, Inc. v. Jassim*, the landlord unilaterally changed the term of the lease, requiring the tenants to vacate more than sixteen months before the original lease term expired.[452] The housing court held that the landlord could not make such a material change in the lease without the consent of the tenants.[453] The consideration originally given for a lease cannot serve as consideration for new terms subsequently added to the lease.[454] Where no consideration is apparent on the face of the agreement, the party relying on it must prove consideration.[455]

4. Waiver of Breaches by Acceptance of Rent

Generally, a tenant's breach of a rental agreement is waived by the landlord's subsequent acceptance of rent with knowledge of the breach.[456] The landlord's intent is irrelevant.[457] In public and subsidized housing, the landlord's acceptance of the government subsidy, or housing assistance payment (HAP), does not constitute waiver.[458] Violations that continue after rent has been accepted are

452. No. C6-90-8892 (Minn. Dist. Ct. Oct. 4, 1990) (decision and order).

453. *Id.*

454. Bartl v. Kenyon, 549 N.W.2d 381, 383 (Minn. Ct. App. 1996), *rev'd on other grounds*, 552 N.W.2d 730 (Minn. 1996).

455. *Id.*

456. Parkin v. Fitzgerald, 307 Minn. 423, 431, 240 N.W.2d 828, 833 (1976); Peebles & Co. v. Sherman, 148 Minn. 282, 283, 181 N.W. 715, 716 (1921); Zotalis v. Canneles, 138 Minn. 179, 181, 164 N.W. 802, 807–08 (1917); Westminster Corp. v. Anderson, 536 N.W.2d 340, 341 (Minn. Ct. App. 1995); Priordale Mall Investors v. Farrington, 411 N.W.2d 582, 584 (Minn. Ct. App. 1987); Burgi v. Eckes, 354 N.W.2d 514, 517 (Minn. Ct. App. 1984).

457. Kenny v. Seu Si Lun, 101 Minn. 253, 256–58, 112 N.W. 220, 221–22 (1907); Common Bond Hous. v. Beier, No. UD-1951204625, slip op. at 6–7 (Minn. Dist. Ct. Feb. 23, 1996) (order granting judgment in favor of defendant).

458. *Westminster Corp.*, 536 N.W.2d at 343. Where the landlord accepts the tenant's rent, regardless of whether the landlord accepted the HAP, waiver has occurred under *Westminster Corp.* and the private housing waiver decisions. In *St. Cloud Housing & Redevelopment Authority v. Slayton*, the trial court concluded that the PHA's acceptance of rent from the tenant in a private agency along with the PHA's recertification and renewal of the lease constituted waiver of lease violations. No. C9-98-1671, slip op. at 10–11 (Minn. Dist. Ct. Nov. 3, 1998) (order denying plaintiff's request for restitution). The court distinguished *Westminster Corp.*, which involved whether housing subsidies from a PHA were rent, and held that such subsidies were not rent. *Id.* Therefore, acceptance of the subsidies did not constitute waiver. *Id.* While in this action, the payments were from a private entity, simply making rent payments on behalf of the tenants. *Id.* at 9–10.

considered new violations and are not waived.[459]

The exceptions to the waiver rule are where the breach is of a lease provision that is part of the consideration and not merely incidental nor collateral to the character of the occupancy,[460] or where the lease contains an enforceable non-waiver clause.[461] Because a non-waiver clause may be modified by subsequent conduct, the mere presence of a non-waiver clause does not automatically bar a waiver claim.[462]

459. Gluck v. Elkan, 36 Minn. 80, 81, 30 N.W. 446, 446 (1886); *Priordale Mall Investors*, 411 N.W.2d at 584. *But see* Christy v. Berends, No. A07-1451, 2008 WL 2796663, at *3–4 (Minn. Ct. App. July 22, 2008) (stating that sublease is not an ongoing lease violation).

460. Cent. Union Trust Co. of New York v. Blank, 168 Minn. 312, 316, 210 N.W. 34, 36 (1926) (finding no waiver when breach of nonpayment of taxes where payment was in lieu of additional rent); *Priordale Mall Investors*, 411 N.W.2d at 585 (finding waiver where lease provisions did not expressly relate to real consideration).

461. MCDA v. Powell, 352 N.W.2d 532, 533–34 (Minn. Ct. App. 1984); *Priordale Mall Investors*, 411 N.W.2d at 585; Las Americas, Inc. v. Am. Indian Neighborhood Dev. Corp., No. A04-505, 2004 WL 2710061, at *6 (Minn. Ct. App. Nov. 30, 2004) (affirming ruling of no waiver of breach where lease contained broad non-waiver clause and landlord's payment of rent received from tenants into court did not constitute waiver). However, there are two types of clauses in leases commonly called non-waiver clauses, but only one type may serve as a non-waiver clause for the purposes of the waiver of breach defense. A clause that protects the landlord from waiver of past breaches by acceptance of rent may be enforceable. However, a clause which states that acceptance of rent following breach of the lease shall not constitute a waiver of a subsequent breach does not protect the landlord from waiver of past breaches. *Priordale Mall Investors*, 411 N.W.2d at 585; Buckeye Realty Co. v. Elias, No. CX-91-0697, slip op. at 6–7 (Minn. Dist. Ct. Aug. 6, 1991) (order denying plaintiff's eviction action) (finding that an election of remedies clause was not an express non-waiver clause and did not protect landlord from waiver of past breaches by acceptance of rent). A lease provision stating that acceptance of rent does not waive rental payment obligations is not a non-waiver of breach clause. Plymouth Ave. Town Houses & Apartments v. Toussaint, No. UD-1980707535, slip op. at 1 (Minn. Dist. Ct. July 27, 1998) (order dismissing unlawful detainer action) (finding that lease provision stating that acceptance of rent does not waive rental payment obligations was not a non-waiver of breach clause, and dismissing for waiver of breach).

462. Pollard v. Southdale Gardens of Edina Condo. Ass'n, 698 N.W.2d 449, 453 (Minn. 2005); McNair v. Doub, No. UD-1960708524 (Minn. Dist. Ct. Aug. 12, 1996) (Appendix 205) (decision and order) (stating that proof of retaliation may void a landlord's non-waiver lease provision); Yvonne M. Rosmarin, *Stopping Defaults with Late Payments*, CLEARINGHOUSE REV. 154, 157–58 (1992) (discussing waiver and estoppel theories and challenges to non-waiver clauses).

5. Discrimination

Discrimination in housing is prohibited under federal and state law, and some ordinances.[463] The discrimination defense can be raised in a breach of lease case, where the landlord is enforcing the lease provision only against members of a protected class or enforces a lease provision that only applies to members of a protected class. In *Zeman v. West*, the landlord required recipients of government benefits to have the government tender their rent to the landlord, while not requiring other tenants to have their rent sent directly to the landlord from their income.[464] The tenant did not tender her rent because she was concerned about repairs.[465] The landlord issued a notice to quit, allegedly based on not tendering rent and not paying the entire security deposit.[466] The trial court held that the lease provision violated the state discrimination statute and that the landlord failed to rebut the defendant's prima facie case of discrimination.[467]

6. Reasonable Accommodation of Disabilities

In 1973, Congress created an affirmative obligation on landlords receiving federal financial assistance to reasonably accommodate the disability of the tenant.[468] In 1988, amendments to the Fair Housing Act extended the obligation to reasonably accommodate disabilities to private landlords.[469] The Minnesota

463. Fair Housing Act, 42 U.S.C. § 3604 (2006) (designating race, color, religion, sex, familial status, handicap, and national origin as protected classes); MINN. STAT. § 363A.09 (2008) (designating race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, and familial status as protected classes); MINNEAPOLIS, MINN. CODE § 139.40(e) (2009) (establishing race, color, creed, religion, ancestry, national origin, sex, sexual orientation, disability, marital status, status with regard to public assistance and familial status as protected classes).

464. No. UD-1910402521, slip op. at 3–4 (Minn. Dist. Ct. Apr. 30, 1991) (order granting judgment for defendant).

465. *Id.* at 2.

466. *Id.* at 3.

467. *Id.* at 4. *See also* Hegenes Props. v. Reed, No. UD-4920624902, slip op. at 3–4 (Minn. Dist. Ct. Aug. 7, 1992) (order granting judgment for defendant) (stating that landlord could not evict tenant, a single parent with three children, for allegedly violating a lease provision prohibiting an adult from supervising more than two children at the swimming pool, and finding that the provision discriminated on the basis of marital and family status in violation state and federal law); *supra* notes 417–21.

468. Rehabilitation Act of 1973, 29 U.S.C. § 794 (2006); 24 C.F.R. § 8.1 (2008).

469. 42 U.S.C. § 3604(f)(3); 24 C.F.R. § 1.4.

Human Rights Act also makes it unlawful to discriminate in housing on the basis of disability.[470] Examples of a landlord's failure to reasonably accommodate a tenant with disabilities include: failing to arrange for chore services to help a tenant prepare for spraying her apartment for insects,[471] insisting that the tenant clean up her apartment while she was physically unable to do so,[472] failing to forebear from eviction in order to give the tenant an opportunity to pursue a program or treatment that could mitigate further violations of the lease,[473] failing to make minor modifications in the lease or rules to accommodate the tenant's disability,[474] proceeding with eviction where the tenant had cured the violation,[475] and failing to respond to the defendant's proposal of a mental health case management worker serving as a communication intermediary between the plaintiff and the defendant.[476] A landlord who reasonably accommodated a tenant's disability in the past still has an ongoing obligation to continue to make reasonable accommodations.[477] A landlord may not have to

470. MINN. STAT. § 363A.09–.10 (2008).

471. Cent. Cmty. Hous. Trust v. Anderson, No. UD-1901102531, slip op. at 3 (Minn. Dist. Ct. Nov. 28, 1990) (order granting judgment for defendant).

472. Schuett Inv. Co. v. Anderson, 386 N.W.2d 249, 253 (Minn. Ct. App. 1986).

473. Cornwell & Taylor LLP v. Moore, No. C8-00-1000, 2000 WL 1887528 (Minn. Ct. App. Dec. 22, 2000); City Wide Assocs. v. Penfield, No. 89-SP-9147-S, slip op. at 6 (Mass. Dist. Ct. Apr. 21, 1989), *aff'd*, 409 Mass. 140, 564 N.E.2d 1003 (1991) (order affirming judgment for possession). *But see* Minneapolis Pub. Hous. Auth. v. Rozas, C0-95-956, 1996 WL 5780 (Minn. Ct. App. Jan. 9, 1996) (finding that PHA reasonably accommodated substance abuse by allowing tenant to retain lease during incarceration).

474. Common Bond Hous. v. Beier, No. UD-1951204625, slip op. at 6 (Minn. Dist. Ct. Feb. 23, 1996) (order granting judgment in favor of defendant) (finding no breach of lease by tenant for keeping a cat as an appropriate doctor-prescribed accommodation). *But see* Anoka County Cmty. Action Program v. Solmonson, No. A05-1251, 2006 WL 1320332 (Minn. Ct. App. May 16, 2006) (affirming trial court decision that tenant failed to prove landlord's failure to reasonably accommodate disability, where landlord granted one request to allow a companion animal on the property, but denied another request to relocate tenant because landlord had no other available appropriate housing that would fit tenant's needs).

475. Minneapolis Pub. Hous. Auth. v. Otto, No. UD-1970326517, slip op. at 4 (Minn. Dist. Ct. May 9, 1997) (order awarding judgment for possession to defendant) (holding forfeiture of tenant's public housing lease, considering his disability, indigency, and his willingness to cure any claimed breaches, would be inappropriate).

476. Dominium Mgmt. Servs., Inc. v. REDACTED, No. HC-1021106500 (Minn. Dist. Ct. Mar. 4, 2003) (decision and order), *aff'd*, Dominium Mgmt. Servs., Inc. v. C.L., No. A03-85, 2003 WL 22890386 (Minn. Ct. App. Dec. 9, 2003).

477. *Id.*

accommodate a tenant's illegal drug use.[478]

7. Public and Government-Subsidized Housing

Landlords participating in public and government-subsidized housing programs must comply with the statutory and regulatory requirements of the program. Most of the programs require material lease violations or good cause for eviction related to the tenant's conduct.[479] Many decisions have discussed and applied these standards to individual facts to determine whether a claimed lease violation constitutes a material violation or good cause for eviction.[480] Landlords often allege a series of unrelated minor lease

478. Pub. Hous. Agency of St. Paul v. Ewig, No. A07-1199, 2008 WL 2106692 (Minn. Ct. App. May 20, 2008).

479. *See supra* notes 100–02 and accompanying text.

480. *See, e.g.*, Alterations: Berry v. Lane, Nos. UD-1980629502 and UD-1980603900, slip op. at 3–4 (Minn. Dist. Ct. July 22, 1998) (order denying plaintiff's unlawful detainer action) (holding that landlord did not prove breaches of the lease to warrant termination, where tenant brought pets to the property to deal with mice but removed the pets at the landlord's request, removed a refrigerator which did not work and replaced it, and the tenants and her children caused *de minimis* damage to the property).

Assault and threats: Hoglund-Hall v. Kleinschmidt, 381 N.W.2d 889, 891–93 (Minn. Ct. App. 1986) (finding that tenant assaulted and threatened others); Anoka County Cmty. Action Program v. Solmonson, No. A05-1251, 2006 WL 1320332, at *3 (Minn. Ct. App. May 16, 2006) (affirming trial court decision finding material violations of aggressive behavior toward other tenants).

Cure: Minneapolis Pub. Hous. Auth. v. Otto, No. UD-1970326517, slip op. at 4 (Minn. Dist. Ct. May 9, 1997) (order granting possession to defendant tenant) (decision and order) (finding no good cause for eviction where tenant got rid of the dog and denied access to the guests who offended other tenants in public housing situation).

Damage: Crossroads of Edina v. REDACTED, No. HC-0111028513 (Minn. Dist. Ct. Nov. 16, 2001) (decision and order) (HUD subsidized project: damage to the premises must be more than minimal to be a material breach or material non-compliance with the lease; held damage was material non-compliance); Carriage House Apartments v. Stewart, No. UD-1970107501, slip op. at 9–10 (Minn. Dist. Ct. May 13, 1997) (order granting plaintiff restitution of the premises) (finding good cause for eviction from a subsidized project where tenant poured gasoline on clothing, started a fire, and obstructed the response to the fire, and finding no good cause where a tenant allowed an unauthorized resident to live with her, in subsidized project case); Teamster Retiree Hous. of Minneapolis, Inc. v. Goldstein, No. UD-1960919514, slip op. at 7 (Minn. Dist. Ct. Oct. 21, 1996) (order permitting tenant to remain in possession) (finding the damages caused by the tenant were minor, the tenant agreed to fix them, the landlord could have made repairs and assessed cost to the tenant, some problems were not caused by the tenant, and some storage problems were not hazardous).

Deposit: Northgate Hous. Ltd. v. McLeod, No. S0441-94 CnC (Vt. Sup. Ct. Jan. 24, 1995) (finding no serious or repeated lease violations where landlord

waived or did not prove tenant did not pay deposit five years earlier; finding allegations of damaging apartment, disturbing tenants, staling mulch, and abandoning lumber were not proven but would not have been sufficient; and finding fiancé was not an unauthorized resident following landlord's improper denial of his addition to the lease).

Domestic violence: The Violence Against Women and Department of Justice Reauthorization Act of 2005, commonly called the Violence Against Women Act (VAWA), bars evictions for lease violations which are the result of domestic violence, dating violence, or stalking of the tenant or immediate family members. 42 U.S.C. § 1437d (l)(5–6) (2006). *See* Metro N. Owners, LLC v. Thorpe, 870 N.Y.S.2d 768, 2008 WL 5381477 (N.Y. City Civ. Ct. 2008) (dismissing eviction claiming nuisance where tenant was victim of domestic violence and entitled to protection under VAWA).

Failure to prove violation: Minneapolis Pub. Hous. Auth. v. Brown, No. UD-1960306523, slip op. at 3 (Minn. Dist. Ct. May 16, 1996) (order granting possession to defendant tenant) (finding that the landlord did not prove that the tenant engaged in drug-related criminal activity on or near the premises).

Failure to report income: H & Val J. Rothschild, Inc. v. Sampson, No. C395396, 1995 WL 619792 (Minn. Ct. App. Oct. 24, 1995) (finding, in a subsidized project, tenant under-reported income and underpaid rent).

Housekeeping: Johnson v. Bostic, UD-1951205504, slip op. at 6 (Minn. Dist. Ct. Feb. 12, 1996) (order denying plaintiff's unlawful detainer action) (stating that housekeeping problems and noise from tenant in Section 8 certificate housing did not amount to good cause).

Identification: Bethune Assocs. v. Davis, No. C8-95-705, 1995 WL 619794, at *1–2 (Minn. Ct. App. Oct. 24, 1995) (holding that in a subsidized project, there was no material lease violation or repeated violations where tenant did not show identification to security guard upon request, and tenant defended himself when attacked by security guard).

Invalid lease provision: Johnson v. Bostic, No. 1950508539 (Minn. Dist. Ct. June 5, 1995) (order dismissing plaintiff's unlawful detainer action) (citing a case with a Section 8 certificate/voucher, holding that landlord did not prove tenant did not shovel snow, provision prohibiting young boy and girl from sharing bedroom was invalid, neighbor disturbed by normal noise of small children).

Late fees: Cent. Cmty. Hous. Trust v. Anderson, No. UD-1900611534, slip op. at 3 (Minn. Dist. Ct. July 6, 1990) (order denying plaintiff's motion to evict) (holding that a $20 late fee bore no relation to cost of landlord's preparation of form notice and slipping the notice under the tenant's door, triggering the tenant's prompt action in paying the rent).

Late rent: Oak Glen of Edina v. Brewington, 642 N.W.2d 481 (Minn. Ct. App. 2002) (holding that late rent is a minor violation in a HUD subsidized project; repeated late payment of rent may constitute a material breach; landlord presented no evidence that late payment affected the landlord's rental business; "principal reason for the waiver rule is to instill a feeling of repose in the tenant; the landlord, by accepting the rent, effectively reaffirms the lease between parties;" and landlord waives breach by late payment of rent by accepting timely rental payment following the last late payment); Chancellor Manor v. Gates, 649 N.W.2d 892 (Minn. Ct. App. 2002) (finding that in HUD subsidized project, sixty-eight late rent notices and eight eviction court cases for rent constituted repeated minor violations which had a adverse financial effect on the project, supporting eviction).

Noise and disturbances: Ford v. REDACTED, No. HC-1020325505 (Minn. Dist. Ct. Apr. 06, 2002) (decision and order) (Section 8 voucher, plaintiff failed to

prove that loud cars belonged to tenant's guests, that defendant knew or should have known that guests had firearms, that children hanging around the property were defendant's guests, that trash in the yard was from defendant's apartment, that a basement electrical fire resulted from defendant's conduct, that the notice of intent to condemn resulted from defendant's conduct, and that the smell of marijuana came from defendant's apartment; plaintiff failed to allege drug use with any particularity; action dismissed and defendant awarded costs and disbursements); Hegenes Props. v. Reed, No. UD-4920624902, slip op. at 4 (Minn. Dist. Ct. Aug. 7, 1992) (order denying plaintiff's eviction action) (deciding that a tenant's disturbance of other tenant on one occasion and violation of city code on one other occasion did not constitute serious or repeated violations of the lease).

Recertification: St. Cloud Hous. & Redevelopment Auth. v. Slayton, No. C9-98-1671, slip op. at 6–9 (Minn. Dist. Ct. Nov. 3, 1998) (order denying plaintiff's request for restitution of the premises) (citing case where the PHA accepted the tenant's late recertification, PHA did not prove that the tenant's daughter's babysitting job away from the premises constituted operation of a daycare business on the premises, the repayment agreement between the parties over back rent did not provide for eviction as a consequence for nonpayment or late payment, and the PHA's acceptance of rent from the tenant in a private agency along with the PHA's recertification and renewal of the lease constituted waiver of lease violations).

Rent: Horning Props. v. Wang, No. C3-98-1211 (Minn. Dist. Ct. June 23, 1998) (order dismissing plaintiff's unlawful detainer action) (holding no lease violation where the tenant in a Rural Housing and Community Development Service Subsidized Housing Project tendered April rent that the landlord refused, which did not support the eviction notice; tenant legally resided on the property during her incarceration so as to not breach the lease); Hous. Auth. of St. Louis County v. Boone, 747 S.W.2d 311, 316 (Mo. Ct. App. 1988) (stating that in public housing, tenant not at fault for nonpayment of rent where the PHA failed to adjust the rent in accordance with changing circumstances).

Self-defense: Bethune Assocs. v. Davis, No. C8-95-705, 1995 WL 619794, at *2 (Minn. Ct. App. Oct. 24, 1995) (citing a subsidized project case, with no material lease violation or repeated violations where tenant did not show identification to security guard upon request, and tenant defended himself when attacked by security guard).

Temporary absence: Hous. & Redevelopment Auth. of Winona v. Fedorko, C4-94-884, 1994 WL 654525 (Minn. Ct. App. Nov. 22, 1994) (remanding a public housing case for further findings, and implying that eviction was not supported where tenant temporarily moved to a nursing home while litigating state's refusal to approve his personal care attendant).

Termination of tenant's employment: Mountainview Place Apartments v. Ford, No. 94CV1492, slip op. at 3 (Colo. County Ct. Mar. 24, 1994) (decision and order) (stating that Section 8 project tenancy was unaffected by employment agreement, and termination of employment was not good cause for eviction).

Unauthorized resident: Buckeye Reality Co., v. Elias, No. CX-91-0697 (Minn. Dist. Ct. Aug. 6, 1991) (findings of fact, conclusions of law, order and order for judgment) (finding that minor housekeeping violations and occupancy by unauthorized persons who left the premises after verbal notice from the landlord probably did not constitute material noncompliance with the lease or other good cause); Minneapolis Pub. Hous. Auth. v. Rozas, C0-95-956, 1996 WL 5780 (Minn. Ct. App. Jan. 9, 1996) (involving substance abuse and unauthorized resident).

violations to support eviction. The lease violations should be material and not *de minimis*, and they must be related to be repeated.[481] The court should look closely at the evidence supporting each allegation to determine whether it supports eviction.[482] The trial court must make a specific finding on whether the landlord met the standard of eviction required by the lease and regulations.[483]

Most programs have regulations that deal specifically with claims of criminal activity by tenants and third parties. In public housing, the Cranston-Gonzalez National Affordable Housing Act of 1990 amended the eviction statutes for Public Housing programs requiring leases to include the following language:

> [A]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any

481. *See, e.g.*, Teamster Retiree Hous. of Minneapolis, Inc. v. Goldstein, No. UD-1960919514, slip op. at 5 (Minn. Dist. Ct. Oct. 21, 1996) (decision and order entering judgment for the defendant). The landlord of a Section 8 new construction and Section 202 elderly or handicapped housing project sought to evict the tenant for various alleged lease violations. *Id.* at 2. The court held that under 24 C.F.R. § 247.3, the landlord could evict the tenant only for substantial lease violations or material minor violations. *Id.* at 5. The court concluded that the landlord had not met this standard. *Id.* at 5. The court noted that the damages caused by the tenant were minor, the tenant agreed to fix them, the landlord could have made repairs and assessed cost to the tenant, some problems were not caused by the tenant, and some storage problems were not hazardous. *Id.* The court noted that these disputes could and should be resolved by greater cooperation, better communication, or mediation, but the tenant should not be evicted for these kinds of disputes. *Id.* at 7. *See also* Waimanalo Vill. Residents' Corp. v. Young, 956 P.2d 1285, 1300 (Haw. Ct. App. 1998) (holding that material noncompliance requires more than a handful of minor incidents that occur over a short span of time; tenant must also receive notice that the conduct is disturbing neighbors); Mid-Northern Mgmt., Inc. v. Heinzeroth, 599 N.E.2d 568, 572–74 (Ill. App. Ct. 1992) (stating that only a material violation of lease may result in eviction provided there is evidence the tenant received notice of the violation); Common Bond Hous. v. Beier, UD-1951204625 (Minn. Dist. Ct. Feb. 23, 1996) (findings of fact, conclusions of law, and order) (concluding that a pre-eviction termination notice is required).

482. Bloomington Assocs. v. Wade, No. UD-1990706521, slip op. at 9–10 (Minn. Dist. Ct. Aug. 19, 1999) (decision and order) (stating that in HUD-subsidized project eviction action, court individually analyzed each of the lease violation allegations, concluding that most were the fault and responsibility of other tenants or persons on the property not connected with the tenant; two remaining violations concerning noise and a children's curfew violations were separate minor violations which were not repeated; action dismissed, judgment entered for tenant, and costs and disbursements awarded to tenant).

483. Chancellor Manor v. Thibodeaux, 628 N.W.2d 193 (Minn. Ct. App. 2001).

> member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.[484]

The legislative history calls for eviction protection for innocent family members.[485] However, the Minnesota Supreme Court held in *Minneapolis Public Housing Authority v. Lor* that the public housing authority, and not the courts, should consider "external circumstances."[486] The court then concluded as a matter of law that the tenant had materially breached the lease, essentially holding her strictly liable for her son's activity and reversing both the trial court and the court of appeals.[487]

484. 42 U.S.C. § 1437d(l)(6) (2006). The federal regulation is somewhat different, providing that the lease must provide that drug-related criminal activity engaged in on or off the premises by any tenant, member of the tenant's household or guest, and any such activity engaged in on the premises by any other person under the tenant's control, is grounds for the PHA to terminate tenancy. *Id.* In addition, the lease must provide that a PHA may evict a family when the PHA determines that a household member is illegally using a drug or when the PHA determines that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents. 24 C.F.R. § 966.4(l)(5)(i)(B) (2008). The regulations also provide for housing authority discretion. *Id.*

485. S. REP. NO. 316, 101st Cong., 2d Sess. at 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941. This provision makes criminal activity grounds for eviction of public housing tenants if that action is appropriate in light of all of the facts and circumstances. *Id.* This section would make it clear that criminal activity, including drug-related criminal activity, can be cause for eviction only if it adversely affects the health, safety, and quiet enjoyment of the premises. The Committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For instance, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken responsible steps under the circumstances to prevent the activity. *Id.*

486. 591 N.W.2d 700, 704 (Minn. 1999).

487. *Id.* In *Department of Housing and Urban Development v. Rucker*, the United States Supreme Court held that the statute "*requires* lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity." 535 U.S. 125, 130 (2002) (emphasis added). The Court rejected that the statute included a tenant knowledge requirement. *Id.* at 130–36. However, the public housing authority *is not required to evict* even when the tenant violates the lease provision. *See id.* at 133–34. The *Rucker* court states that:

> The statute does not *require* the eviction of any tenant who violated the lease provision. Instead, it entrusts that decision to the local public housing authorities, who are in the best position to take account of, among other things, the degree to which the housing project suffers from "rampant drug-related or violent crime," "the seriousness of the offending action," and "the extent to which the leaseholder has . . . taken

Contrary to the *Lor* decision, the legislation, regulations, and legislative history support an analysis of whether the elements of claim have been met: (1) whether there was criminal activity,[488] (2) whether there was a threat caused by the criminal activity to health, safety, or peaceful enjoyment of the premises by other tenants, (3) the location of the criminal activity as relates to security on and enjoyment of the premises,[489] and (4) whether the criminal activity was engaged in by a public housing tenant, member of the tenant's household, or guest or other person within the tenant's control.[490]

all reasonable steps to prevent or mitigate the offending action."
Id. (citing 42 U.S.C. § 11901(2) (2006); 66 Fed. Reg. 28776-01, at 28803 (May 24, 2001) (to be codified at 24 C.F.R. § 966.4)). *See generally* Lawrence R. McDonough & Mac McCreight, *Wait a Minute: Slowing Down Criminal-Activity Eviction Cases to Find the Truth*, 41 CLEARINGHOUSE REV. 55 (2007).

488. In *Housing & Redevelopment Authority of Duluth, Inc. v. Adams*, the court concluded that since a crime is conduct prohibited by statute and for which the actor may be sentenced to imprisonment with or without a fine under Minnesota Statutes section 609.02, subdivision 1, municipal ordinance violations are not crimes because ordinances are not state statutes, and statutory petty misdemeanors are not crimes because of the limitation on sentencing. No. C7-99-601573, at 4–5 (Minn. Dist. Ct. Sept. 13, 1999) (decision and order). The court dismissed the action where petty misdemeanor drug charges against the tenant were dismissed and the tenant pled guilty to an amended charge of assault under a municipal ordinance. *Id.* at 3. The court added that there was no serious or repeated violation of a material term of the lease where the arrest took place one mile away from the premises and the event did not constitute criminal activity. *Id.* at 5. *See also* Minneapolis Pub. Hous. Auth. v. Henry, No. UD-1970122503 (Minn. Dist. Ct. May 23, 1997) (decision and order) (affirming referee decision that elderly tenant did not violate state drug covenant where police found trace amount of drugs and paraphernalia with no evidence of the tenant's involvement or knowledge of drug activity, and holding that recovery of drug paraphernalia, without more, does not establish drug-related criminal activity).

489. Powell v. Hous. Auth. of Pittsburgh, 760 A.2d 473, 482 (Pa. Commw. Ct. 2000), *rev'd*, 812 A.2d 1201 (Pa. Commw. Ct. 2002) (criminal activity must be in immediate vicinity of property); Minneapolis Pub. Hous. Auth. v. Drumgoole, No. UD-1970325514, slip op. at 3 (Minn. Dist. Ct. July 2, 1997) (decision and order entering judgment for defendant) (holding public housing landlord could not evict tenant for alleged assault at another building operated by landlord which was not in the surrounding neighborhood); Minneapolis Pub. Hous. Auth. v. Brown, No. UD-1960306523 (Minn. Dist. Ct. May 16, 1995) (decision and order) (holding that landlord did not prove that tenant engaged in drug-related criminal activity on or near the premises).

490. *See* Tyson v. N.Y. City Hous. Auth. 369 F.Supp. 513, 520–21 (S.D.N.Y. 1974); Chicago Hous. Auth. v. Rose, 560 N.E.2d 1131, 1135–37 (Ill. App. Ct. 1990); Hous. Auth. of New Orleans v. Green, 657 S.2d 552, 555–56 (La. Ct. App. 1995) (Ciaccio, J., dissenting); Charlotte Hous. Auth. v. Patterson, 464 S.E.2d 68, 72 (N.C. Ct. App. 1995); Hous. Opportunities Comm'n of Montgomery County v. Lacey, 585 A.2d 219, 221–22 (Md. 1991). *See generally* McDonough & Mac McCreight, *supra* note 487.

State statute also regulates cases involving drug-related activity.[491]

While *Lor* only specifically applies to public housing, it may also be applied to Section 8 certificates and vouchers, given the similar statutory and regulatory provisions and the legislative history ignored by the *Lor* court.[492] Still, as with public housing, a proper analysis would be whether the activity meets all of the elements of the regulations: any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants; any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises; or any drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, any member of the tenant's household, or any guest or other person under the tenant's control.[493] Similar

491. *See infra* text accompanying notes 514–20.

492. 24 C.F.R. § 982.310(c) (2008). The Cranston-Gonzalez National Affordable Housing Act of 1990 amended the eviction statues for Section 8 existing housing certificate and voucher subsidized housing programs to require leases which state as follows:

> [A]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises, or any drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy . . . .

42 U.S.C. § 1437f(d)(1)(B)(iii) (2006). The committee report discussed the assumptions underlying the new lease provision requirement for Section 8 existing housing certificate and voucher housing:

> *Termination of Tenancy*—The bill includes language to permit evictions from Section 8 Existing Housing for criminal activity, including drug related criminal activity. It is based on a similar provision contained in the Anti-Drug Abuse Act of 1988 governing public housing leases. . . . . [T]he Committee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exist.

S. REP. NO. 316, at 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5889. The regulations provide that:

> Any of the following types of criminal activity by the tenant, any member of the household, a guest or another person under the tenant's control shall be cause for termination of tenancy: (1) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; (2) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises; or (3) Any drug-related criminal activity on or near the premises.

493. *See* Am. Apartment Mgmt. Co. v. Phillips, 653 N.E.2d 834, 840–41 (Ill.

regulations govern HUD subsidized projects[494] while more tenant protections are included in the Rural Housing and Community Development Service regulations.[495]

8. Manufactured and Mobile Home Park Lot Tenancies

The tenancy may be terminated by the landlord only for the reasons specified by statute.[496] Defenses include inadequate notice period,[497] the notice did not specify the reasons for termination,[498]

App. Ct. 1995) (affirming dismissal of Section 8 certificate by holding provision under federal regulation governing conduct of "a guest or other person under the tenant's control" was ambiguous, concluding that the guest must be under the tenant's control; tenant did not have knowledge of drug-related criminal activity of one-time guest); Diversified Realty Group, Inc. v. Davis, 628 N.E.2d 1081, 1084 (Ill. App. Ct. 1993) (finding that "materiality" and "good cause" provisions of the federally assisted lease precluded the landlord from evicting the tenant where the facts indicated that the tenant was without any knowledge or fault for her guest's criminal conduct); Henry v. Wild Pines Apartments, 359 S.E.2d 237, 238 (Ga. Ct. App. 1987) (reversing an eviction of tenant based upon uninvited and unknown person firing a gun). *See generally* McDonough & McCreight, *supra* note 487, at 55.

494. 24 C.F.R. § 247.3. *See* McDonough & McCreight, *supra* note 487.

495. 7 C.F.R. pt. 3560, subpt. D (2008). *See id.* § 3560.156(c)(6)(iv)(15) (lease provision regarding drug violations); *id.* § 3560.159(a)(1)(iii) (termination of tenancy for drug violations on the premises); *id.* § 3560.159(d) (criminal activity). *See* McDonough & McCreight, *supra* note 487.

496. Minnesota Statutes section 327C.09 states that the following may be permitted in certain circumstances: nonpayment of rent following ten days' written notice; violation of mobile home ordinances, rules and laws, following a reasonable time after written notice of noncompliance; rule violations, after failure to cure following thirty days' written notice; endangerment or substantial annoyance after notice; repeated serious violations of the lease or certain laws, following written notice and warning and continued violation; material misstatement in the application, if termination occurs within one year of when the tenant first paid rent; improvement of the park, after ninety days' written notice; and park or lot closing, after nine months' written notice, but relocation within the lot. MINN. STAT. §§ 327C.09–.095 (2008). *See* Country View Mobile Home Park v. Oliveras, No. A04-160, 2004 WL 2049986, at *2 (Minn. Ct. App. Sept. 14, 2004) (affirmed district court's decision) (affirmed district court conclusion that mobile home park lot owner did not prove that conviction for possession of child pornography was grounds for eviction); Larson v. REDACTED, No. HC030324502 (Minn. Dist. Ct. Feb. 12, 2004) (decision and order) (tenant's ordinance violations were repeated but not serious; tenant may raise landlord's violation of the covenants of habitability as a cause of tenant violation of the lease, where park owner's park design violated a local ordinance and forces tenant to violate the same ordinance).

497. Lea v. Pieper, 345 N.W.2d 267, 270–72 (Minn. Ct. App. 1984); W.J. Props., Inc. v. Schneider, No. C6-01-1023, 2002 WL 206337 (Minn. Ct. App. 2002) (affirming eviction where landlord claimed material misstatement on application, the parties settled for tenant repairs and removal of pets, and the tenant violated terms of settlement, holding that subsequent statutory notice was not required).

the rule is unreasonable,[499] the rule constitutes a substantial modification of the original lease or rules,[500] improper notice to adopt or amend a rule,[501] the tenant cured the violation,[502] waiver of notice,[503] and retaliation.[504]

498. *See* Hedlund v. Potter, No. C3-91-1383 (Minn. Dist. Ct. Oct. 22, 1991) (order dismissing plaintiff's unlawful detainer action) (finding that a generalized notice that was not specific as to time and date of the violation of the lease terms or mobile home park's rules, and that did not provide for required time to remedy the conduct was not sufficient).

499. MINN. STAT. §§ 327C.10, subdiv. 3, 327C.01, subdiv. 8; *Lea*, 345 N.W.2d at 271–72; Northview Villa M.H.P. v. Henderson, No. C2-90-13460, slip op. at 5 (Minn. Dist. Ct. Apr. 24, 1991) (decision and order) (finding that plaintiff's no pet rule was a reasonable rule).

500. MINN. STAT. §§ 327C.02, subdiv. 2, 327C.01, subdiv. 11. *See* Lemke v. VanNess, 436 N.W.2d 784, 787 (Minn. Ct. App. 1989) (finding that lease required the landlord to repair damage from ordinary wear and tear, new rule which required the tenants to make such repairs was a substantial modification of the lease, and unenforceable); Renish v. Hometown Am., L.L.C., No. A05-2384, 2006 WL 2474090, at *1 (Minn. Ct. App. Aug. 29, 2006) (affirming district court decision that imposing separate utility bills was a substantial modification of the lease and was arbitrary and capricious). *But see* S. Valley Inv. Co. v. Krogstad, No. C2-01-631, 2001 WL 1117865, at *2 (Minn. Ct. App. Sept. 25, 2001) (stating that lease amendment which requires residents to maintain their homes, decks, and sheds to meet "reasonable standards for appearance and general condition," is not a substantial modification and can be enforced against resident).

501. § 327C.02, subdiv. 2; Hedlund v. Davis, No. C1-91-1687, slip op. at 3 (Minn. Dist. Ct. Dec. 31, 1991) (order denying plaintiff's request for eviction) (finding that landlord's request for additional fees was improper because there was no notice informing the tenants that such charges could be imposed under the rental agreement).

502. MINN. STAT. § 327C.09, subdiv. 4. *See* Condodemetraky v. Walker, No. 90-C-287, slip op. at 11–12 (N.H. Super. Ct. Nov. 21, 1990) (order denying plaintiff's writ of possession) (finding that park tenant cured minor violations in a reasonable time).

503. MINN. STAT. § 327C.11, subdiv. 2; *Lea*, 345 N.W.2d at 271; Howard Lake Mobile Home Park v. REDACTED, No. C1-01-2272, slip op. at 14 (Minn. Dist. Ct. Nov. 19, 2001) (findings of fact, conclusions of law, and order) (concluding waiver of notice to terminate manufactured home lot rental by receiving, retaining, and intending to negotiate rent check). *See supra* notes 402–16 and accompanying text.

504. MINN. STAT. § 327C.12; Tamarack Court, Inc. v. Milliman, No. C2-02-1787, 2003 WL 21911150, at *3 (Minn. Ct. App. Aug. 12, 2003) (affirming holding of no retaliation where trial court concluded that tenant did not prove retaliation when the presumption of retaliation applied, but also concluded that manufactured home park had a legitimate economic reason for eviction); *Howard Lake Mobile Home Park*, at 14 (plaintiff's notice was in retaliation for defendant's complaints to police and resident's association). *See supra* notes 390–402 and accompanying text.

9. Unconscionable Lease Term

A contract is unconscionable where "no decent, fair-minded person would view the result of its enforcement without being possessed of a profound sense of injustice."[505] In other words, a contract is unconscionable if it is "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."[506] Unconscionability is a question of law.[507] The party alleging unconscionability must show it had no meaningful choice but to accept the contract term as offered, and that the term is unreasonably favorable to the other party.[508] The trial court should consider the contract terms and the circumstances. An unconscionable lease term is unenforceable.[509]

10. Allegations of Unlawful Activity

When first required by statute, the tenant covenanted not to allow controlled substances unlawfully in the premises, and that those under the tenant's control would not use the premises to carry out activities that violated controlled substances laws. In 1997, the drug covenant was expanded to cover other types of unlawful activity, and to cover landlords as well as tenants. Now, both the tenant and the landlord, as well as the licensor and licensee, covenant that neither will: (1) unlawfully allow illegal drugs on the premises, the common area, or curtilage,[510] (2) allow prostitution or prostitution-related activity to occur in the premises,

505. Zontelli & Sons, Inc. v. City of Nashwauk, 353 N.W.2d 600, 604–05 (Minn. Ct. App. 1984), *rev'd on other grounds*, 373 N.W.2d 744 (Minn. 1985).

506. *In re* Estate of Hoffbeck, 415 N.W.2d 447, 449 (Minn. Ct. App. 1987) (quoting Hume v. U.S., 132 U.S. 406, 411 (1889)).

507. RJM Sales & Mktg. v. Banfi Prods. Corp., 546 F. Supp. 1368, 1375 (D. Minn. 1982).

508. Dorso Trailer Sales v. Am. Body & Trailer, 372 N.W.2d 412, 415 (Minn. Ct. App. 1985).

509. Pickerign v. Pasco Mktg., Inc., 303 Minn. 442, 446, 228 N.W.2d 562, 565 (1975) (finding lease provisions to be unconscionable and questioning in dictum the thirty days' notice to service station operators in each agreement); *In re* Estate of Hoffbeck, 415 N.W.2d at 449; Johnson v. Bostic, No. UD-1950508539, slip op. at 2–3 (Minn. Dist. Ct. June 5, 1995) (decision and order awarding possession to defendant) (finding that a provision prohibiting young boy and girl from sharing a bedroom was invalid); Miller v. George, No. UD-1941223501, slip op. at 3 (Minn. Dist. Ct. Jan. 10, 1995) (decision and order) (finding that a $25 late fee for nonpayment of $10 rent is unconscionable).

510. MINN. STAT. § 504B.171, subdiv. 1(i) (2008) (formerly codified at MINN. STAT. § 504.181 (1998)).

common area, or curtilage,[511] or (3) allow the unlawful use or possession of certain firearms in the premises, common area, or curtilage.[512] The parties also covenant that they or persons acting under their control will not use the common area and curtilage to carry out activities in violation of illegal drug laws.[513] Neither drug covenant is violated if someone other than one of these parties possesses or allows illegal drugs on the property, unless the party knew or had reason to know of the activity.[514] A breach of the covenant voids the lessee's right to possession of the premises, but all other provisions of the lease remain in effect until the lease is terminated by the terms of the lease or operation of law.[515] The parties may not waive nor modify the covenant. The landlord may assign the right to bring the action to the county attorney.[516]

511. *Id.*, subdiv. 1(ii).

512. *Id.*, subdiv. 1(iii).

513. *Id.*, subdiv. 2.

514. *Id.* The Legislature did not extend this part of the statute to the prostitution and firearms covenants. It is unclear whether that was intentional or a drafting oversight. However, the fact that each of the covenants uses the word "allow" suggests that the test for liability is whether the party was directly involved or acquiesced in the conduct of others.

515. *Id.*

516. *Id.* In *Minneapolis Public Housing Authority v. Folger*, the tenant's guest consumed drugs and died of an overdose while the tenant was sleeping. No. UD-1971114532, slip op. at 5 (Minn. Dist. Ct. Jan. 23, 1998) (order and memorandum denying plaintiff's motion to set aside trial court order). The court concluded that the public housing authority did not prove that the tenant violated the lease, as the tenant did not "allow" his guest to use drugs or engage in criminal activity, and the tenant did not violate Minnesota Statutes section 504.181 (currently codified at section 504B.171 (2008)) because the tenant did not know or have reason to know of his guest's prohibited activity. The decision was affirmed on judge review (Minn. Dist. Ct. Apr. 13, 1998) (order and memorandum). *See* Minneapolis Pub. Hous. Auth. v. Jivens, No. UD-1920720559 (Minn. Dist. Ct. Sept. 9, 1992) (order and memorandum entering judgment for defendant) (involving public housing where tenant not responsible for illegal drugs on the premises brought by a person who was on the premises without the tenant's knowledge or consent, but with the consent of a guest of the tenant).

A seizure of contraband or a controlled substance manufactured, distributed or acquired in violation of controlled substances statutes and with a retail value of at least $100 also constitutes unlawful detention by the tenant. § 504B.301 (2008) (formerly codified at § 566.02 (1998)); *id.* § 609.5317, subdiv. (1)(a).

In cases alleging criminal activity, an issue can be whether evidence allegedly obtained improperly by the police should be admitted in a civil proceeding. While there is little authority specifically involving eviction actions, there is authority governing other civil proceedings. In *State Patrol v. State, D.P.S.*, the court of appeals held that the exclusionary rule applied to a labor arbitration proceeding involving the possible loss of a job. 437 N.W.2d 670, 676–77 (Minn.

In cases alleging criminal activity, one issue can be whether evidence allegedly obtained improperly by the police should be admitted in a civil proceeding. There have been several criminal cases discussing whether the landlord can authorize a police search of a tenant's apartment or other rented property.[517] The courts have begun to apply the exclusionary rule to civil proceedings.[518] The propriety of the search has also been considered in eviction cases.[519] While it is difficult to make firm conclusions based on

Ct. App. 1989). The court noted:

> The primary purpose, if not the sole purpose, of the exclusionary rule is to deter future unlawful police conduct. To give effect to this deterrence function, we cannot allow one government agency to use the fruits of unlawful conduct by another branch of the same agency to obtain an employee's dismissal. Furthermore, the loss of a job is a very severe sanction which warrants special condition. We agree with Judge J. Skelly Wright of the court of appeals for the District of Columbia, who wrote: It would seem wholly at odds with our traditions to allow the admission of evidence illegally seized by Government agents in discharge proceedings, which the Court has analogized to proceedings that "involve the imposition of criminal sanctions . . . ."

Id. at 676 (quoting Powell v. Zuckert, 366 F.2d 634, 640 (D.C. Cir. 1966)).

517. In *State v. Licari*, the court held that (1) the defendant had capacity to challenge a search of a rented storage unit based on the rental facility manager's consent; (2) the landlord's contractual right to inspect did not give her actual authority to consent to search; (3) the police officer's mistaken belief that the landlord had authority to consent to search was not reasonable for purposes of the apparent authority exception to warrant requirement; (4) the intrusion was not justified under the plain-view exception to the warrant requirement; and (5) the manager's entry into the storage unit at the officer's request would have been subject to the same constitutional constraints as the officer's entry. 659 N.W.2d 243 (Minn. 2003). *See* State v. Frey, No. C3-01-718, 2002 WL 206628 (Minn. Ct. App. Feb. 12, 2002) (stating that warrantless search is improper where landlord unlocked apartment door for police and post-entry conduct exceeded the scope of the emergency exception to the warrant requirement). *But see* State v. Herzog, No. C3-01-802, 2002 WL 769215 (Minn. Ct. App. Apr. 30, 2002) (pre-*Licari* decision: it was reasonable for officer to believe caretaker had authority to consent to the search of the garage; consent exception applies and the warrantless entry was permissible).

518. In *Alman v. Anderson*, the Minnesota Supreme Court affirmed as not clearly erroneous the trial court's ruling in a negligence action that blood alcohol tests would be excluded because the driver's consent was not knowingly given. 264 N.W.2d 651, 652 (Minn. 1978). However, the court stated that "[w]e do not pass on the question of the use of blood samples in civil litigation where there has been no consent to the taking of the blood." *Id.* at 652 n.1.

519. Minneapolis Pub. Hous. Auth. v. REDACTED, No. HC-10306313566 (Minn. Dist. Ct. July 31, 2003) (findings of fact and order) (denying and expunging public housing eviction because landlord did not prove that police officer properly learned about marijuana where officer entered apartment with consent of tenant to look for trespassed person, and did not prove that marijuana was in plain view; small amount of marijuana was not criminal activity; landlord's

these cases, it appears that the tenant has the strongest argument for excluding improperly obtained evidence in a public housing eviction where the government is the landlord, another branch of the government obtained the evidence, and the branches may well have worked together.[520]

11. The Breach Is Not Material

In an eviction action alleging breach of lease, the landlord must prove a material breach or substantial failure in performance.[521] To determine present possessory rights, it is necessary to determine the truth of the allegations in the complaint and whether the plaintiff demonstrates a "material" breach of the lease agreement.[522]

12. Cure

In one public housing case, the court of appeals held that the

knowledge of alleged altercation was from a police report whose authors did not testify, and did not connect tenant to the incident); Minneapolis Pub. Hous. Auth. v. REDACTED, No. HC000921508 (Minn. Dist. Ct. Oct. 20, 2000) (excluding evidence from a warrantless search of the apartment).

520. Minneapolis Pub. Hous. Auth. v. Martin, No. HC000921508 (Minn. Dist. Ct. Oct. 23, 2000) (order dismissing action) (holding evidence from warrantless search excluded and action dismissed).

521. Cut Price Super Mkts. v. Kingpin Foods, Inc., 256 Minn. 339, 351, 98 N.W.2d 257, 266 (1959); Cloverdale Foods, Inc. v. Pioneer Snacks, 580 N.W.2d 46, 49 (Minn. Ct. App. 1998).

522. *Cloverdale Foods*, 580 N.W.2d at 49. *See* Skogberg v. Huisman, No. C7-02-2059, 2003 WL 22014576 (Minn. Ct. App. Apr. 19, 2003) (finding that a breach that improved land and did not damage the landlord was not material under a clear error rather than *de novo* review; rejected argument that any breach was material) (citing *Cloverdale Foods*, 580 N.W.2d 46); Skogberg v. Huisman, No. C9-01-1131, 2002 WL 417185 (Minn. Ct. App. Mar. 19, 2002) (affirming findings that landlord failed to prove subletting where farmer-tenant farmed with his relative but did not assign control to him, and landlord accepted late payments; reversed finding that alteration was not a breach, but remanded to determine whether breach was material); Amsler v. Harris, No. UD-1990826901, slip op. at 4 (Minn. Dist. Ct. Sept. 20, 1999) (decision and order denying landlord's motion for removal) (holding that tenant did not breach material term of lease where provision on occupancy limit was an afterthought to the entire lease, was not in the body of the agreement, and was not initialed by the parties); D & D Real Estate Inv. v. Hughes, No. UD-1990311505, slip op. at 2 (Minn. Dist. Ct. Mar. 30, 1999) (decision and order dismissing complaint) (involving no convincing evidence as to the dollar amount of damage to a door to determine whether damage was material or *de minimis*, and the landlord failed to prove that the tenant or one of her guests damaged the door where the tenant claimed damage was caused by a burglar).

landlord's right of action is complete upon the tenant's breach of the lease, and subsequent remedial action cannot nullify the violation.[523] Later, the court of appeals appeared to be rethinking this bar. After summarizing the defendant's cure argument, the court stated that "[the defendant] removed the boxes creating the fire hazard prior to the time of hearing and thus therefore redeemed her tenancy."[524] The court of appeals rejected the cure argument in more recent unpublished decisions.[525] The district courts appear willing to allow the tenant to cure the lease violation in some circumstances.[526]

13. Tenant Guest and Trespass Rules

Some landlords have created trespass lists, under which the landlord seeks to exclude from the premises persons whose names are contained on the list. In a tenancy, the tenant has been given possession, which is exclusive even against the landlord and with the only exceptions being the landlord's right to enter the premises to demand rent or make repairs, or exceptions provided by the

523. Minneapolis Cmty. Dev. Agency v. Smallwood, 379 N.W.2d 554, 556 (Minn. Ct. App. 1985). The *Smallwood* Court relied upon *First Minnesota Trust Co. v. Lancaster Corp.*, 185 Minn. 121, 131, 240 N.W. 459, 464 (1931), which followed earlier decisions and held that in a nonpayment of rent case, the landlord's right of action is complete upon the default in payment of rent, eliminating the need for a right of reentry clause in the lease.

524. Schuett Inv. Co. v. Anderson, 386 N.W.2d 249, 252 (Minn. Ct. App. 1986). However, the court decided the case based upon the landlord's failure to accommodate the defendant's disability. *Id.* at 253.

525. Willow Point Partners, LLC v. Willows on the Water, LLC, No. A03-225, 2003 WL 22998880 (Minn. Ct. App. Dec. 23, 2003) (finding that tenant was in default under the lease and tenant was not entitled to notice and an opportunity to cure; tenant failed to satisfy the settlement agreement when it issued a check with insufficient funds; tenant was not required to pay the full amount due under the lease for future months to redeem the property); Castaways Marina, Inc. v. Dedrickson, No. C1-02-1425, 2003 WL 1961861 (Minn. Ct. App. Apr. 29, 2003) (the right to redeem does not apply to an action for breach which does not include a claim for rent).

526. Berry v. Lane and Lane v. Berry, Nos. UD-1980629502 and UD-1980603900, slip op. at 3–4 (Minn. Dist. Ct. July 22, 1998) (decision and order dismissing landlord's claim to evict) (stating that landlord did not prove breaches of the lease to warrant termination where tenant brought pets to the property to deal with mice but removed the pets at the landlord's request, a tenant removed a refrigerator that did not work and replaced it, the tenants and her children caused *de minimis* damage to the property); Minneapolis Pub. Hous. Auth. v. Otto, No. UD-1970326517, slip op. at 4 (Minn. Dist. Ct. May 9, 1997) (decision and order awarding possession to defendant) (holding that tenant cured alleged lease violation by getting rid of his dog).

lease.[527] The tenant decides who may visit the tenant. The landlord does not have the right to exclude guests of the tenant without a court order.[528]

14. Eviction for Emergency Police Calls

A landlord may not bar or limit a tenant's right to call for police or emergency assistance in response to domestic abuse or any other conduct.[529] A landlord may also not impose a penalty on a tenant for calling for police or emergency assistance in response to domestic abuse or any other conduct.[530] A tenant may not waive this right and the landlord may not require the tenant to do so.[531] While the statute does not refer to eviction actions, the prohibition against landlord-imposed penalties on tenants for making emergency calls should allow the tenant to defend eviction actions where the landlord claims a right of eviction because of emergency calls, or where the tenant claims that the landlord's notice to quit is based upon the tenant's emergency calls.[532]

527. Seabloom v. Krier, 219 Minn. 362, 367, 18 N.W.2d 88, 91 (1945).

528. State v. Hoyt, 304 N.W.2d 884 (Minn. 1981) (reversing a conviction for trespass where guest had claim of right to visit nursing home resident after administrator revoked her privilege to enter the premises); State v. Holiday, 585 N.W.2d 68, 70–71 (Minn. Ct. App. 1998) (holding that since the tenant is the lawful possessor of the property, the police or the housing authority can only serve as agents for the tenant, and since the tenant could not exclude a person from all properties of the public housing authority, neither could the police or the public housing authority as an agent for the tenant).

529. MINN. STAT. § 504B.205, subdiv. 2(1)–(2) (2008) (formerly codified at MINN. STAT. § 504.215) (1998)).

530. *Id.*

531. *Id.*, subdiv. 2(2)(b). Local ordinances that require eviction or penalize a landlord in response to tenant calls for police or emergency assistance are preempted. *Id.*, subdiv. 3(1)–(2). A tenant may bring a civil action for violation of the statute for the greater of $250 or actual damages, and reasonable attorney fees. *Id.*, subdiv. 5. The Attorney General also can investigate and prosecute violations of the statute. *Id.*, subdiv. 6.

532. In Real Estate Equities, Inc. v. Schmidt, No. CX-00-297, slip op. at 4 (Minn. Dist. Ct. Mar. 14, 2000) (findings of fact, conclusions of law, order, and order for judgment), the tenant was assaulted on the property both before and after she obtained a restraining order, leading her to call the police. *Id.* at 2. The landlord sent a letter stating the intention to terminate the tenancy based on late payment of rent, damage to the property, and police calls to the unit. *Id.* at 2–3. The parties then executed an agreement to vacate. *Id.* at 3. The court concluded that the termination letter and the resulting agreement violated section 504B.205, rendering the agreement void as contrary to public policy. *Id.* at 3–4. *See also* Haukos-Lund P'ship v. Borjon, No. C3-98-632, slip op. at 6 (Minn. Dist. Ct. Oct. 30, 1998) (decision and order dismissing landlord's claim to evict) (finding in

15. Eviction of One Tenant but Not the Other

The court is divided over whether it has the power to evict one tenant but not the other. In *Steven Scott Management, Inc. v. Scott*, the court of appeals affirmed the finding that the victim did not commit a material violation of the lease, since there was no evidence of any annoyance or danger to other residents.[533] However, the court reversed the trial court's finding regarding the assailant by concluding that a finding that the assailant violated the lease was sufficient to compel issuance of an order against him.[534] Each tenant may have to be a party.[535] However, the court rejected the argument for eviction of only one tenant in *Phillips Neighborhood Housing Trust v. Brown*.[536]

16. Combined Actions for Nonpayment of Rent and Material Lease Violations

A landlord can combine actions for nonpayment of rent and

favor of mobile home park lot tenant, where the landlord sought to evict the tenant for calling the police to respond to a domestic abuse situation); Berry v. Lane and Lane v. Berry, Nos. UD-1980629502 and UD-1980603900, slip op. at 2–4 (Minn. Dist. Ct. July 22, 1998) (decision and order) (finding that landlord asserted numerous 911 calls to the property but could not prove the reasons for the calls, while the tenant asserted the calls were initiated by her for her children's protection; held that landlord could not limit tenant's rights to call for emergency assistance).

533. No. C7-98-2024, 1999 WL 366596, at *1 (Minn. Ct. App. June 8, 1999).

534. *Id.*; *see* U.S. v. 121 Nostrand Ave., 760 F.Supp. 1015, 1032–33 (E.D.N.Y. 1991) (removing adult grandchild who sold drugs from public housing apartment under federal drug forfeiture statute, while allowing grandmother and other household members to remain because she lacked knowledge of drug activity); *Housing Authority Cannot Evict Innocent Family Member Because of the Primary Leaseholder's Criminal Activity*, 23 CLEARINGHOUSE REV. 322 (1989) (citing Akron Metro. Hous. Auth. v. Rice, No. 88-CV-04013 (Ohio Mun. Ct. June 22, 1988) (holding there was no just cause for the eviction of the common law wife and children of the primary leaseholder who was convicted of involuntary manslaughter because they were not involved in the stabbing incident, and involving situation where court could enter judgment in eviction against one household member but not against the rest of the family, who were innocent).

535. *See* Hanson v. Trom, No. UD-1950926503, slip op. at 5 (Minn. Dist. Ct. Nov. 3, 1995) (decision and order dismissing case). Here, the landlord alleged nonpayment of rent against one co-tenant, without naming the other co-tenant. The court held that the landlord failed to name an indispensable party, since the court could not enter final judgment without affecting the interests of the co-tenant. *Id.*

536. 564 N.W.2d 573, 575 (Minn. Ct. App. 1997) (affirming eviction of entire household when one co-tenant violated the lease by engaging in illegal drug activity).

material lease violations.[537] These claims will be heard as alternative grounds.[538] The hearing is bifurcated to cover material violations of the lease first and nonpayment of rent second, if the landlord does not prevail on the material lease violations claim. The tenant is not required to pay into court outstanding rent, interest, or cost to defend against the material lease violation claim.[539] If the court reaches the nonpayment of rent claim, the tenant shall be permitted to present defenses.[540] The tenant shall be given up to seven days to pay any rent and costs determined by the court to be due, either into court or to the landlord.[541]

17. Other Defenses

Upon expiration of an initial term lease, without any action by the parties to renew the lease, the parties' continuation of the landlord-tenant relationship becomes a month-to-month tenant fee and cannot be based on the original written lease.[542] Generally, a party who has breached a contract cannot sue on the basis of the other party's subsequent breach of the contract.[543] Since forfeitures are not favored, lease provisions that result in forfeiture must be strictly construed and will not be enforced when great injustice would be done and the party seeking forfeiture is adequately protected.[544] No advance notice is required for a breach of lease

537. MINN. STAT. § 504B.285, subdiv. 5(a) (2008) (formerly codified at MINN. STAT. § 566.03 (1998))

538. *Id.*

539. *Id.*, subdiv. 5(b).

540. *Id.*, subdiv. 5(c).

541. *Id.*; Kahn v. Greene, No. UD-1940330506 (Minn. Dist. Ct. May 9, 1994).

542. Urban Invs., Inc. v. Thompson, No. UD-1950626525, slip op. at 3–4 (Minn. Dist. Ct. Aug. 10, 1995) (decision and order dismissing plaintiff's unlawful detainer action).

543. Carlson Real Estate Co. v. Soltan, 549 N.W.2d 376, 379–80 (Minn. Ct. App. 1996) (affirming an eviction judgment for the commercial landlord where the landlord's breach was not a direct cause or justification for the tenant's breach); MTS Co. v. Taiga Corp., 365 N.W.2d 321, 327 (Minn. Ct. App. 1985) (holding that a landlord could not seek a remedy against the subtenant, where the landlord was still breaching the agreement at the time of trial, and the subtenant's breach of the agreement directly resulted from the landlord's initial breach of the agreement); Larson v. REDACTED, No. HC-030324502 (Minn. Dist. Ct. Feb. 13, 2004) (decision and order) (tenant may raise landlord's violation of the covenants of habitability as a cause of tenant violation of the lease, where park owner's park design violated a local ordinance and forces tenant to violate the same ordinance).

544. Naftalin v. John Wood Co., 263 Minn. 135, 147, 116 N.W.2d 91, 100 (1962); Warren v. Driscoll, 186 Minn. 1, 5, 242 N.W.2d 346, 347 (1932); 1985 Robert St. Assocs. v. Menard, Inc., 403 N.W.2d 900–03 (Minn. Ct. App. 1987)

eviction[545] but if the lease requires advance notice for breach or rent claims, the landlord must follow the requirements.[546]

V. POST TRIAL ISSUES

A. Eviction by Enforcement of the Writ of Recovery

If the court or jury finds for the plaintiff, the court shall issue a writ of recovery, formerly called a writ of restitution.[547] The court shall stay the writ for a reasonable period not exceeding seven days, where the defendant shows immediate restitution of the premises would work a substantial hardship upon the defendant or the defendant's family.[548] In cases where the landlord proved violations of the illegal drug covenant, or that the tenant caused a nuisance or seriously endangered the safety of other residents, their property, or the landlord's property, the court may not stay issuance of the writ.[549] In mobile home park lot tenancies, the court may issue a conditional writ of restitution, which allows the home to remain on the lot for sixty days for an in-park sale, orders the resident household to vacate the park within a reasonable period not to exceed seven days, and orders the park owner to notify any secured parties known to the park owner.[550]

(holding that forfeiture is appropriate where tenant materially breached lease over long period of time without excuse); Hous. & Redevelopment Auth. of Winona v. Fedorko, C4-94-884, 1994 WL 654525 (Minn. Ct. App. Nov. 22, 1994); Minneapolis Pub. Hous. Auth. v. Otto, No. UD-1970326517 (Minn. Dist. Ct. May 9, 1997) (decision and order awarding possession to defendant) (holding forfeiture of tenant's public housing lease, considering his disability, indigence, and his willingness to cure any claimed breaches, would be inappropriate).

545. Anoka County Cmty. Action Program v. Solmonson, No. A05-1251, 2006 WL 1320332 (Minn. Ct. App. May 16, 2006) (holding one month's notice not required for month-to-month tenancy in eviction action claiming breach of lease).

546. Lawler v. REDACTED, No. HC 010817525 (Minn. Dist. Ct. Sept. 6, 2001) (decision and order) (dismissing breach of lease claim where landlord did not give three days' notice with right to cure as required by lease); O'Connor v. Miller, UD-194-0211505 (Minn. Dist. Ct. Mar. 24, 1994) (decision and order) (stating that lease requirement of notices for breach must be followed).

547. MINN. STAT. § 504B.345, subdiv. 1(a) (2008) (formerly codified at MINN. STAT. § 566.09 (1998)).

548. *Id.*, subdiv. 1(d).

549. *Id.*, subdiv. 1(b).

550. *Id.* § 327C.11, subdiv. 4. The resident household must move out of the park, comply with all rules relating to home and lot maintenance, and pay all rent and utility charges owed to the park owner on time. The writ becomes unconditional and absolute by court order if the resident violates the above obligations and the park owner moves the court for such relief following a three

The landlord must bring the writ to the sheriff or police for service on the defendant.[551] If the defendant does not comply with the demand, the landlord will have to arrange for the sheriff or police to return to the premises and remove the defendant, defendant's family, and their personal property.[552] There are two alternatives for removing and storing the tenant's property.[553] The

days' written notice, or sixty-one days after issuance of the conditional writ. *Id.*

551. *Id.* § 504B.365 (formerly codified at § 566.17 (1998)). Often, the landlord will have to schedule service on a later date. Some sheriffs or police require the landlord not only to prepay the sheriff or police for service, but to arrange for a bonded moving company to remove and store the tenant's possessions if they will be stored in a place other than the premises. The sheriff or police will serve the writ on the defendant, any adult member of the defendant's family holding possession of the premises, or any other person in charge of the premise. The sheriff or police will demand that the defendant and the defendant's family vacate the premises and remove their personal property within twenty-four hours. In cases where the landlord prevails on claims of violations of the illegal drug covenant, or that the tenant caused a nuisance or seriously endangered the safety of other residents, their property, or the landlord's property, execution of the writ receive priority. *Id.*

552. *Id.*, subdiv. 1(b).

553. When property is to be stored in a place other than the premises, the sheriff or police shall remove the property at the plaintiff's expense. Often the sheriff or police will require the plaintiff to use a bonded moving company. The plaintiff shall have a lien upon the personal property only for the reasonable costs and expenses incurred from removing and storing the property. The plaintiff may retain possession of the personal property until payment. If the defendant does not pay such costs and expenses within sixty days after execution of the writ, the plaintiff may enforce the lien by holding a sale. *Id.* §§ 514.18–.22, 504B.365. *See* Conseco Loan Fin. Co. v. Boswell, 687 N.W.2d 646 (Minn. Ct. App. 2004) (manufactured home park lot owner who stored tenant's manufactured home on the premises retained only a claim for storage costs, and not a lien); Alexander v. DaimlerChrysler Servs. N. Am., L.L.C., No. A03-351, 2003 WL 22183564 (Minn. Ct. App. Sept. 23, 2003) (affirmed conclusion that plaintiff properly sold defendant's remaining property); Lang v. Terpstra, No. UD-1940207512 (Minn. Dist. Ct. June 12, 1994) (decision and order granting defendant's motion to enjoin) (finding that notice of sale under Minnesota Statutes section 504.24 (currently codified at Minnesota Statutes section 504B.271 (2008)) did not amount to election of remedies precluding storage company from enforcing lien under section 514.18 *et seq.*, but notice did not comply with section 514.21 requirement of publication).

When property is to be stored on the premises, the plaintiff must send written notice to the defendant of the date and approximate time when the sheriff or police is scheduled to execute the writ. The notice must inform the defendants that they and their property will be removed if they do not vacate by the date and time stated in the notice. The notice must be mailed as soon as the plaintiff knows of the date and time for execution. The plaintiff also must attempt in good faith to notify the defendant by telephone. After the sheriff or police enters the premises, the plaintiff may remove the property. In the officer's presence, the plaintiff must prepare, sign and date an inventory, which includes a listing of the items of personal property and description of their condition; the date, signature

landlord might only have thirty days to enforce the writ.[554] The sheriff may have immunity from liability where the writ is enforced incorrectly.[555] Housing courts in the Fourth and Second Districts (Hennepin and Ramsey counties) retain jurisdiction in eviction actions to decide disputes concerning removal of property following execution of the writ of restitution.[556]

Unless the premises have been abandoned, a plaintiff or plaintiff's agent who enters the premises and removes the defendant's property in violation of the statute is guilty of a misdemeanor for wrongful ouster and is liable to the tenant up to treble damages or $500, whichever is greater, and reasonable attorney's fees.[557] Where the tenant was wrongfully evicted, the landlord must bear the expenses of removal, storage, and return of the tenant's personal property.[558]

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of the plaintiff or plaintiff's agent, and the name and telephone member of the person authorized to release the property; and the name and badge number of the officer. The officer shall retain a copy of the inventory. The plaintiff must mail a copy of the inventory to an address provided by the defendant, or to the defendant's last known address. The plaintiff is responsible for proper removal, storage, and care of the property, and is liable for damages for loss of or injury to the property caused by a failure to exercise care as a reasonably careful person would exercise under the circumstances. § 504B.365. The abandoned property statute, Minnesota Statutes section 504B.271 (formerly codified at Minnesota Statutes section 504.24 (1998)), governs storage and return of the property. The landlord must store the property for sixty days. The landlord must notify the tenant at least fourteen days before sale of the property. The landlord has only a claim, and not a lien, for the reasonable removal and storage costs. *Id.*; City View v. Brooks, No. UD-1950907539, slip op. at 2 (Minn. Dist. Ct. Nov. 13, 1995) (decision and order holding that landlord return plaintiff's property) (holding that landlord may not hold property to force payment of back rent). If the landlord fails to allow the tenant to take possession of the property within twenty-four hours of the tenant's written demand, exclusive of weekends and holidays, the landlord is liable for punitive damages up to $300.

554. DePetro v. DePetro, No. A03-727, 2004 WL 885552 (Minn. Ct. App. Apr. 27, 2004) (noting that housing court would not reissue writ of recovery which has not been executed within thirty days of original issuance).

555. *See* Pahnke v. Anderson Moving and Storage, 720 N.W.2d 875 (Minn. Ct. App. 2006), in which the sheriff executed the writ of recovery at the time it was served, rather than waiting twenty-four hours after service, because the writ required immediate removal. The court of appeals affirmed summary judgment against the tenant, concluding that the officers were performing ministerial function, and because they were relying on the terms of the writ.

556. § 504B.365.

557. *Id.*; Veard-Brooklyn Ctr. v. REDACTED, No. HC-1000512508 (Minn. Dist. Ct. Aug. 23, 2000) (decision and order) (stating that landlord illegally changed locks following posting of writ; tenant awarded treble the value of lost or damaged property and $500 in attorney fees).

558. Kowalenko v. Haines, No. C6-85-1365, slip op. at 2 (Minn. Ct. App. July

If the landlord accepts payment of rent and/or rent arrearages after receiving judgment for restitution of the premises, the landlord may waive the right to execute the writ. By accepting payment of arrearages, the landlord is allowing the tenant to redeem.[559]

Landlords occasionally include provisions for future payments of rent in settlement agreements. While the landlord may obtain a writ and evict the tenant for failing to make installment payments on back rent, the landlord must file a new action if future rents are not paid.[560]

23, 1985) (order) (ordering landlord to return property); Durigan v. Smith, No. UD-80515 (Minn. Dist. Ct. July 25, 1977) (order).

559. Cent. Brooklyn Urban Dev. Corp. v. Copeland, 471 N.Y.S.2d 989, 993 (Civ. Ct. 1984) (involving government-subsidized housing, payment of government subsidy after issuance of writ waives the writ). In *Connelly v. Lewis*, the landlord filed an eviction action for nonpayment of rent for May, and obtained a default judgment. No. C8-96-426, slip op. at 2 (Minn. Dist. Ct. Aug. 21, 1996) (order dismissing case). The tenants paid rent to the landlord for May, June and July. *Id.* In August, the landlord sought and obtained a writ of restitution. *Id.* On the tenant's motion, the court first ordered an emergency stay of enforcement of the writ of restitution. *Id.* The court later vacated the writ and dismissed the case based on the tenant's argument that the landlord waived the right to restitution by accepting rent for the month in question and for later months, and that the rent transactions created a new tenancy between the parties. *Id.*

560. In *Erin Realty v. REDACTED*, the payments in the settlement agreement beyond the first payment included future rents for eight months as well as alleged past amounts due to plaintiff. No. HC-030918514 (Minn. Dist. Ct. Mar. 16, 2004) (decision and order). The defendant made all of the payments for five months. *Id.* The plaintiff obtained a writ of recovery after defendant made a partial payment in the sixth month, and the defendant moved to quash the writ. *Id.* The court concluded that:

> 1. When the parties to an eviction agree to a schedule of future payments to retire the debt alleged in the complaint, the landlord may obtain a writ of recovery if the tenant fails to make a payment.
> 2. The landlord may not obtain a writ of recovery for failure to pay future rents not alleged as due in the complaint, as it would constitute a waiver of the tenant's right to the protections of the eviction process in Minn. Stat. Ch. 504B and the right to raise defenses to the landlord's claim as to nonpayment of future rents.
> 3. In the absence of factual findings by the Court regarding amounts owing, a writ of recovery based on violation of a settlement agreement for future payments which do not distinguish between future rents and amounts found to be past due will not be enforced. In order to enforce rights under the agreement, the Plaintiff must file a new eviction action.

Id. at 1–2; Rupert House Co. v. Altmann, 127 Misc.2d 115, 485 N.Y.S.2d 472 (1985) (finding that a stipulation that entitles a landlord to evict a residential tenant for nonpayment of amounts of rent exceeding the amount of rent sought in the petition is unconscionable and violates public policy; such a mode of coercing

B. Motions

1. Motions in Anticipation of Appeal

It is no longer necessary to bring a motion for new trial or other post trial motion to preserve issues on appeal in an eviction action.[561] After judgment is rendered for the plaintiff, if the defendant or the defendant's attorney states to the court the intention to appeal, the writ shall not issue for twenty-four hours after judgment.[562] Where the tenant appeals after the writ has been issued, the court shall give the appealing defendant a certificate of appeal, which when served upon the sheriff or police shall stay further execution of the writ.[563]

For most tenants, appeal will be pointless unless the tenant can retain possession of the premises pending appeal. Cost and supersedeas bonds affect the tenant's right to retain possession. The cost bond is to cover payment of all costs and disbursements awarded against the appellant, or $500. Prior to filing the notice of appeal, the appellant may move the trial court for an order waiving or reducing the required bond or deposit. The respondent may waive the bond.[564] No bond is required when the trial court finds

payments of rents not yet due would impede the tenant's ability to assert against the landlord future defenses such as a breach of the warranty of habitability).

561. Scroggins v. Solchaga, 552 N.W.2d 248 (Minn. Ct. App. 1996); Minneapolis Pub. Hous. Auth. v. Greene, 463 N.W.2d 558, 560 (Minn. Ct. App. 1990). There is some question whether the court may entertain a motion for a new trial. In *Stock v. Beaulieu*, the court granted a writ of prohibition precluding the district court from enforcing an order granting a new trial. No. C4-95-989 (Minn. Ct. App. May 9, 1995) (decision and order dismissing plaintiff's unlawful detainer action). The court concluded that the eviction statute's creation of a summary proceeding did not contemplate a new trial, and that the petitioner would not be able to attack the order for a new trial on appeal from the decision in the second trial. *Id.* The court did not discuss whether the grounds for new trial had merit. *Id.* The dissent asserted that the statute does not deprive the district court of its authority under Minnesota Rule of Civil Procedure 60.02(f) to grant a new trial in the interest of justice. *Id.*

562. The exception is: (1) "In an action on a lease," based upon holding over after expiration of the lease or termination of the lease by notice to quit, and (2) "[t]he Plaintiff give a bond conditioned to pay all [of the Defendant's] costs and damages [if] . . . the judgment of restitution is reversed and a new trial ordered." MINN. STAT. § 504B.371, subdiv. 7 (2008) (formerly codified at MINN. STAT. § 566.11 (1998)).

563. The exception is "where judgment for restitution has been entered on a lease" in an action for holding over after expiration of the lease or termination of the lease by notice to quit. *Id.* § 504B.371 (formerly codified at §§ 566.11–.13 (1998)).

564. *Id.*

that the appellant is indigent, and that in the interest of the appellant's right to appeal, the bond will not be required.[565]

The supersedeas bond is to protect the respondent from loss during the appeal.

> [T]he condition of the bond shall be the payment of the value of the use and occupation of the property from the time of the appeal until the delivery of possession of the property if the judgment is affirmed and the undertaking that the appellant shall not commit or suffer the commission of any waste on the property while it remains in the appellant's possession during the pendency of the appeal.[566]

Since most tenants cannot afford to pay up front all the anticipated rent accruing during appeal or a bond to cover such rent, the tenant should be allowed to pay the rent each month as it accrues.[567] Payment of past rent allegedly owed should not be included in the bond. In government-subsidized housing, the bond should cover only the tenant's share of the rent.[568] The tenant is obligated only to pay rent that would come due during the appeal, rather than rent that was allegedly due before the appeal.[569] If the district court sets the bond in an excessive amount,

565. Minn. R. Civ. App. P. 107.01, subdiv. 1. Additionally, under the *in forma pauperis* statute, section 563.01, subdivision 3, the court shall allow appeal without prepayment of costs and security if the court finds that the action is not frivolous and the appellants affidavit is in proper form and not untrue.

566. MINN. R. CIV. APP. P. 108.01, subdiv. 5. Section 504B.371, subdivision 3 (formerly codified at section 566.12 (1998)) states that the appealing defendant may remain in possession of the premises and execution of the writ shall be stayed, if the defendant pays a cost bond and "all rents and other damages" of the plaintiff during the appeal. The exception is "in an action on a lease," based upon holding over after expiration of the lease or termination of the lease by notice to quit, "the plaintiff gives a bond conditioned to pay all [of the defendant's] costs and damages [if] . . . the judgment of restitution is reversed and a new trial ordered." *Id.*, subdiv. 7. In the limited cases where this exception applies, it is inconsistent with Minnesota Rule of Civil Appellate Procedure, subdivision 5.

567. Buddhu v. Ellis, No. UD-1880908580 (Minn. Dist. Ct. Sept. 30, 1988) (supplemental order mandating that defendant post bond).

568. Tullahoma Vill. Apartments v. Cyree, No. 85-206-II, slip op. at 5 (Tenn. Ct. App. Feb. 7, 1986) (order reversing dismissal of unlawful detainer defense).

569. Thompson v. Gates, No. UD-197011509 (Minn. Dist. Ct. Feb. 28, 1997) (order for review) (ordering tenant to pay rent into court as it came due, rather than paying alleged past due rent); Phillips Neighborhood Hous. Trust v. Brown, No. UD-1960705508 (Minn. Dist. Ct. Nov. 26, 1996) (order approving motion for expungement of unlawful detainer) (denying landlord's motion for pre-judge review of rents not accepted by the landlord; ordering tenant to pay rent into court as it comes due).

the tenant should file the appeal and make a motion to the court of appeals to reduce the amount.[570]

2. Motion to Vacate Judgment and Stay or Quash the Writ of Restitution

The court has authority to entertain a motion to vacate a judgment in an eviction action, either under the court's inherent power to review its own action,[571] or by rule.[572] Where the court lacks personal jurisdiction over the defendant due to inadequate service, a judgment entered by default must be vacated unconditionally.[573] No showing of a meritorious defense is necessary.[574] The court may vacate a judgment and writ obtained by the landlord where the landlord did not have grounds for the eviction complaint,[575] or where the landlord claimed that the tenant

570. Sisto v. Hous. & Redev. Auth., 258 Minn. 391, 395, 104 N.W.2d 529, 532 (1960).

571. Itasca County v. Ralph, 144 Minn. 446, 449, 175 N.W. 899, 900 (1920); Crosby v. Farmer, 39 Minn. 305, 309, 40 N.W. 71, 73 (1888).

572. Minn. R. Civ. P. 60.02; Wong Kong Har Wun Sun Ass'n v. Chin, No. C8-87-2439 (Minn. Ct. App. Apr. 12, 1988) (decision of appeal from district court decision) (holding that trial court abused discretion in refusing to vacate default eviction judgment due to mistake).

573. Lange v. Johnson, 295 Minn. 320, 323, 240 N.W.2d 205, 208 (1973).

574. Hengel v. Hyatt, 312 Minn. 317, 318, 252 N.W.2d 105, 106 (1977); Minneapolis Pub. Hous. Auth. v. Kline, No. UD-1930712506, slip op. at 2 (Minn. Dist. Ct. Aug. 5, 1993) (order granting motion to quash writ) (involving situation where service was on child who did not reside on the premises).

575. Pub. Hous. Agency of St. Paul v. Simpkins, No. C7-97-2137, slip op. at 2 (Minn. Dist. Ct. Jan. 30, 1998) (order). The public housing authority gave the tenant a fourteen-day nonpayment of rent notice for $25. *Id.* The tenant then paid the rent and a late fee. *Id.* However, the PHA applied the payments to alleged arrearage for previous months, and filed an unlawful detainer action claiming nonpayment of the February rent. *Id.* The referee allowed the PHA to amend its claim orally, and ordered the tenant to pay $209 and court costs within seven days or move. *Id.* at 3. The tenant moved and later obtained bank verification of deposit of the tenant's payment. *Id.* The tenant moved to vacate the judgment, which was first denied by another referee, and then granted on judge review. *Id.* The court concluded the first referee erred by going beyond the pleadings and ordering the tenant to pay more than had been pled, and the second referee erred in denying the motion to vacate. *Id.* The court noted that it would be unjust to evict another tenant who moved into the unit vacated by the tenant, so the court ordered the PHA to place the tenant's name immediately at the top of the waiting list for the next available vacancy without requiring her to address claims for past due rents. *Id.* at 4. *See also* Filas v. REDACTED, No. HC 040115532 (Minn. Dist. Ct. Feb. 18, 2004) (order granting motion to quash writ) (dismissing eviction where "[p]laintiffs were not the real parties in interest when the complaint was filed because they had executed a contract for deed, now

violated a settlement agreement where the tenant substantially complied, or the landlord did not comply.[576] When the landlord and tenant agreed to a schedule for payments of back and future rent, the landlord may obtain a writ and evict the tenant for failing to make installment payments on back rent, but not for future rent for which the landlord must file a new action.[577]

3. Motion for Costs, Disbursements, and Attorney Fees

The prevailing party is entitled to disbursements and $200 in costs.[578] Tenants only began requesting costs recently, with costs being awarded regularly when requested.[579] Costs are available for dismissal for lack of personal jurisdiction.[580] The court may allow the tenant to credit an award of costs and disbursements against rent.[581] The other side of the issue is that landlords are also

cancelled, with another vendee.").

576. *See* Transcript of Record at 2, Huntington Place v. Scott, No. UD-1980409509 (Minn. Dist. Ct. Apr. 30, 1998) (motion partial transcript). Here, the court ordered the tenant to pay rent that day. *Id.* The tenant contacted county emergency assistance that day, which agreed to make payment but did not accomplish it that day. *Id.* at 3. The court concluded that the tenant made a good faith effort to redeem, and in fact redeemed, and ordered the judgment and writ vacated. *Id. See also* Patterson v. Heinecke, No. C3-00-600301 (Minn. Dist. Ct. Mar. 24, 2000) (order vacating writ) (stating that the parties settled for payment of back rent but plaintiff refused to cooperate, and ordering plaintiff to immediately cooperate with defendant to provide forms necessary to obtain rental assistance from the Salvation Army). Judge Oswald stated, "[t]his Court is not going to act as Plaintiff's rent collection agency nor is it going to allow Plaintiff's own refusal to cooperate to frustrate the prior settlement of the parties." *Id.* at 2. *See* Pham v. REDACTED, No. HC 102061505 (Minn. Dist. Ct. July 10, 2002) (order granting motion to vacate default judgment where tenant was late for hearing because of disability, and tenant provided Section 8 documentation of payments during months at issue).

577. *See supra* note 560 and accompanying text.

578. MINN. STAT. § 549.02, subdiv. 1 (2008).

579. *See, e.g.*, Dominium Mgmt. Servs., Inc. v. C.L., No. HC-1021106500 (Minn. Dist. Ct. Mar. 4, 2003), *aff'd*, No. A03-85, 2003 WL 22890386 (Minn. Ct. App. Dec. 9, 2003) (dismissing action and awarding the defendant costs and disbursements); Connelly v. Schiff, No. HC-1000417515 (Minn. Dist. Ct. May 23, 2000) (decision and order) (awarding judgment for defendant); *see also* Franklin v. Rae, No. HC-1000121503, slip op. at 1 (Minn. Dist. Ct. Mar. 9, 2000) (decision and order) (awarding judgment for defendant); Smith v. Brinkman, Nos. HC-1000124900, HC-1000202517, slip op. at 5 (Minn. Dist. Ct. Mar. 9, 2000) (decision and order) (dismissing eviction action); Hurt v. Johnston, No. HC-000103513, slip op. at 1–2 (Minn. Dist. Ct. Feb. 9, 2000) (decision and order dismissing case).

580. Nieszner v. St. Paul Sch. Dist. No. 625, 643 N.W.2d 645 (Minn. Ct. App. 2002).

581. *See, e.g.*, Svendsen v. REDACTED, No. HC-1031006570 (Minn. Dist. Ct.

beginning to request costs.[582]

The appellate courts have inconsistently ruled on whether attorney's fees may be awarded in eviction actions. In *Duling Optical Corp. v. First Union Management, Inc.*, the court of appeals affirmed the district court's conclusion in a separate damages action.[583] The court held that it lacked jurisdiction to award attorney's fees for separate eviction actions since the issue of attorney's fees should have been decided in the eviction actions.[584] However, in *Eagan East Ltd. Partnership v. Powers Investigations, Inc.*, the trial court ruled that the tenant was not entitled to attorney's fees under the lease.[585] The court of appeals held that the trial court's jurisdiction was limited to determining present possessory rights of the parties, and that the trial court exceeded its jurisdiction by ruling on attorney's fee issues.[586] Consolidation of the eviction action with a tenant-initiated case, such as a rent escrow, tenant remedies, lockout, or emergency relief action, would give rise to attorney's fees.[587]

4. Motion to Seal or Expunge Court Records

In some circumstances, the court may consider sealing or expunging the eviction court records. The benefit for the tenant is keeping court records out of the reach of tenant screening agencies, since many landlords will not rent to tenants who have even one case on their record, regardless of the outcome.[588] Until the recent passage of an expungement statute, the issue was one of common law, based on the court's inherent power to control court

Dec. 3, 2003) (decision and order) (awarding $200 in costs which could be credited against rent where action dismissed for accepting partial payment in rent); SJM Props., Inc. v. REDACTED, No. HC-020402501 (Minn. Dist. Ct. Apr. 11, 2002) (order dismissing plaintiff's action and awarding defendant costs and disbursements that may be credited against rent, and granting expungement).

582. *See* Fradette v. Mettner, No. C4-00-56 (Minn. Dist. Ct. Jan. 26, 2000) (order) (citing MINN. STAT. §§ 549.02, 549.04). The court awarded plaintiff $402 in costs and disbursements, including $200 in statutory costs.

583. No. C5-95-2718, 1996 WL 453580, at *2 (Minn. Ct. App. Aug. 13, 1996) (reversal of order).

584. *Id.*

585. 554 N.W.2d 621, 622 (Minn. Ct. App. 1996).

586. *Id.*

587. Smith v. Brinkman, Nos. HC-1000124900, HC-1000202517, slip op. at 5 (Minn. Dist. Ct. Mar. 9, 2000) (decision and order dismissing eviction action).

588. Lumpkin v. Lewis, No. 96-10295, slip op. at 2 (Minn. Dist. Ct. July 12, 1996) (order directing defendant to show cause).

functions.[589]

In 1999, the Minnesota Legislature provided the procedures for expungement in Minnesota Statutes section 484.014.[590] It defines "expungement" as the "removal of evidence of the court file's existence from the publicly accessible records."[591] It defines "eviction case" as an action brought under the eviction statutes[592] and "court file" as the "court file created when an eviction case is filed with the court."[593] The statute provides for discretionary expungement noting that:

> The court may order expungement of an eviction case court file only upon motion of a defendant and decision by the court, if the court finds that the plaintiff's case is sufficiently without basis in fact or law, which may include lack of jurisdiction over the case, that expungement is clearly in the interests of justice and those interests are not outweighed by the public's interest in knowing about the record.[594]

The main difference between common law and statutory expungements are that the former focuses only on the equities and does not require that the landlord's claim be flawed. Expungements have been granted under the common law where the defendant was not at fault[595] and where unique circumstances

589. Player v. King, UD-1960306541, slip op. at 2 (Minn. Dist. Ct. May 2, 1996) (decision and order) (holding that the dismissed companion eviction action records be sealed in an Emergency Tenant's Remedies and Lock-out Action, at compliance hearing). *See* Phillips Neighborhood Hous. Trust v. Brown, No. UD-1960705508 (Minn. Dist. Ct. Mar. 2, 1998) (decision and order approving the parties' joint motion for expungement) (expunging name of tenant on joint motion of parties where the landlord prevailed in action for breach of lease by the co-tenant because there was no question that the tenant seeking expungement was not at fault for the breach); Cent. Manor Apartments v. Beckman, Nos. UD-1980609509, UD-1980513525 (Minn. Dist. Ct. July 29, 1998) (decision and order denying plaintiff's complaint) (stating that the ends of justice would be best served by expunging a second eviction action where landlord could have sought relief by motion in first eviction action). *See generally* State v. C.A., 304 N.W.2d 353 (Minn. 1981); State v. T.M.B., 590 N.W.2d 809 (Minn. Ct. App. 1999) (stating that courts may exercise their inherent authority to issue expungement orders affecting court records, and the judiciary may not order expungement of criminal records maintained by executive branch agencies absent evidence of an injustice resulting from an abuse of discretion in the performance of an executive function).

590. MINN. STAT. § 484.014 (2008).

591. *Id.*, subdiv. 1(1).

592. *Id.*, subdiv. 1(2).

593. *Id.*, subdiv. 1(3).

594. *Id.*, subdiv. 2.

595. Bigos Mgmt., Inc. v. REDACTED, No. HC-030423531 (Minn. Dist. Ct. July

outside the tenant's control led to the eviction.[596] Subsequent to August 1, 2008, the court shall expunge the file in an eviction action filed by the foreclosing mortgagee or contract for deed canceling vendor if the court finds that the defendant vacated before commencement of the eviction action, or a tenant-defendant did not receive a proper lease termination notice under Minnesota Statutes section 504B.285.[597]

Decisions on statutory expungements often rest on whether the landlord's claim lacked sufficient merit. Statutory expungements have been granted where the plaintiff defaulted,[598] service was improper,[599] the complaint was inadequately pled,[600] the plaintiff was not entitled to possession of the property,[601] the action was moot,[602] the landlord participating in the Section 8 voucher program did not serve the Section 8 office,[603] the landlord failed to

11, 2003) (citing State v. C.A., 304 N.W.2d 353 (Minn. 1981)) (order to expunge) (explaining that expungement would be granted for subtenant but not tenant because while tenant breached the lease by failing to pay rent, subtenant did not).

596. St. Louis Park Place, LLC v. REDACTED, No. HC-1031015540 (Minn. Dist. Ct. Nov. 12, 2004) (order on motion for review) (rejecting referee's denial of expungement where tenants failed to pay rent on time because they were traveling back and forth to their home town to attend the funerals of friends killed in a school shooting, and later paid rent and remained tenants); Brooklyn Park Hous. Assoc., LLP v. REDACTED, No. HC-040218503 (Minn. Dist. Ct. Oct. 14, 2004) (decision and order) (rejecting referee's denial of expungement where tenant failed to pay rent on time when tenant took leave from work to care for her child who was recuperating from brain surgery, and tenant later paid rent and remained a tenant).

597. § 484.014, subdiv. 3. *See supra* notes 588–96; *infra* notes 588–612.

598. Christopherson Props. v. REDACTED, No. HC-031205518, slip op. at 1 (Minn. Dist. Ct. Feb. 24, 2004) (decision and order) (granting expungement where "[p]laintiff defaulted at first appearance, thereby failing to establish a legal or factual basis for the complaint.").

599. Harris v. REDACTED, Nos. HC-031014526, HC-031006514 (Minn. Dist. Ct. Jan. 16, 2004) (decision and order) (granting expungement and two awards of costs for two cases involving improper service).

600. Crofton v. REDACTED, No. HC-031120528 (Minn. Dist. Ct. Mar. 16, 2004) (decision and order) (granting expungement where complaint lacked specificity on breach, and landlord failed to attach lease or bring it to first appearance).

601. Filas v. REDACTED, No. HC-040115532 (Minn. Dist. Ct. Mar. 10, 2004) (decision and order) (granting expungement where "[p]laintiffs were not the real parties in interest when the complaint was filed because they had executed a contract for deed, now cancelled, with another vendee").

602. Ukatu v. REDACTED, No. HC-0307614501 (Minn. Dist. Ct. July 30, 2003) (order) (granting expungement because eviction case is moot when tenants have vacated).

603. McCampbell v. REDACTED, No. HC-000601500 (Minn. Dist. Ct. July 14, 2000) (housing court decision and order) (granting expungement since Section 8

comply with the address disclosure statute,[604] the landlord filed the action prematurely,[605] the parties agreed to expungement,[606] and in cases where tenants had defenses to the landlord's claims of nonpayment of rent,[607] notice to terminate the tenancy,[608] and breach of lease.[609] Tenants have been successful challenging

landlord's failure to serve the housing authority was a jurisdictional defect, depriving the court of jurisdiction).

604. Stein v. REDACTED, No. HC-000804513 (Minn. Dist. Ct. Nov. 8, 2000) (citing MINN. STAT. § 504B.181 (2008) (formerly codified at MINN. STAT. § 504.22 (1998)) (finding a violation of the landlord's requirement to comply with the address disclosure statute).

605. McCampbell v. REDACTED, No. HC-000814500 (Minn. Dist. Ct. Nov. 8, 2000) (housing court decision and order).

606. Heintzman v. Steinman, No. C7-99-1772 (Minn. Dist. Ct. Dec. 29, 1999) (housing court decision and order) (granting expungement and dismissing the action with prejudice based upon stipulation for dismissal). However, some argue that statutory expungement requires specific findings, so that a stipulation for expungement cannot bind the court. *See* MINN. STAT. § 484.014, subdiv. 2 (2008) ("the court may order expungement … *if the court finds* that the plaintiff's case is sufficiently without basis in fact or law, which may include lack of jurisdiction over the case, that expungement is clearly in the interests of justice and those interests are not outweighed by the public's interest in knowing about the record.") (emphasis added).

607. Brooklyn Ctr. Leased Hous. v. REDACTED, No. HC-031216540 (Minn. Dist. Ct. Mar. 10, 2004) (housing court decision and order) (granting expungement where landlord's accounting records resulted in confusion of amount of rent due); Taylor v. REDACTED, No. HC-031202508 (Minn. Dist. Ct. Mar. 10, 2004) (housing court decision and order) (granting expungement where the case was brought by plaintiff, landlord, without a rental license); Gardner Invs., Inc. v. REDACTED, No. HC-040102502 (Minn. Dist. Ct. Mar. 10, 2004) (decision and order) (granting expungement where the landlord waived prompt payment of rent); Valley Inv. & Mgmt., Inc. v. REDACTED, No. HC-000927525 (Minn. Dist. Ct. Dec. 19, 2000) (order on motion for expungement and costs) (citing section 504B.291 (formerly codified at § 504.02 (1998)) (granting expungement where plaintiff, landlord, accepted part payment of rent without a written agreement retaining the right to evict for the balance, under section 504B.291); Mar-Jil Corp. v. REDACTED, No. HC-1020802508 (Minn. Dist. Ct. Oct. 28, 2002) (housing court decision and order) (granting expungement where the defendant, tenant, raised a habitability defense to a claim for nonpayment of rent and the parties settled after plaintiff agreed to make repairs).

608. Payne v. REDACTED, No. HC-1010801519 (Minn. Dist. Ct. Aug. 23, 2001) (decision and order) (granting expungement where plaintiff, landlord, failed to rebut a presumption of retaliation).

609. O'Brian v. REDACTED, No. HC-1010402506 (Minn. Dist. Ct. Apr. 18, 2001) (decision and order) (granting expungement where an oral lease contained no right of reentry clause); Minneapolis Pub. Hous. Auth. v. REDACTED, No. 1951117536 (Minn. Dist. Ct. Mar. 28, 2003) (order) rev'g (Minn. Dist. Ct. Feb. 24, 2003) (referee's decision and order) (reversing referee's denial of expungement where tenant settled, vacated and raised an expungement motion defense under the illegal activity statute because the "adverse effect of even a 'settled' case outweighs the public interest").

referee expungement denials on judge review.[610]

In the Fourth District of Minnesota, Hennepin County, the housing court scheduled a monthly calendar for expungement motions. Motions must be filed and served on the opposing party at least ten days before the hearing. However, on some occasions the court will grant an expungement at the same time that it dismisses an eviction action. Tenants should ask for expungement concurrently with the request for relief in an eviction action. Either the court will consider it at the time it determines the outcome of the case, or it may require the tenant to bring a separate motion on the monthly calendar.

Occasionally, court personnel may be reluctant to expunge a court file where there is a settlement agreement setting out actions or events that will occur in the future. The tenant should ask the court to order immediate expungement. This is especially important when the tenant is seeking new housing.[611] Some court administrators question whether expungement applies to public access computer records as well as hard files. The statute defines expungement as the removal of evidence of the court file's existence from the publicly accessible records, which should include electronic records as well as paper records.[612]

610. McCampbell v. REDACTED, No. HC-031002506 (Minn. Dist. Ct. Jan. 22, 2004) (decision and order) rev'g (Minn. Dist. Ct. Nov. 5, 2003) (referee's decision and order) (reversing referee's denial of expungement where a successful eviction defense gave rise to a presumption of retaliation for a subsequent notice to vacate and the landlord's evidence of prior tenant claims against the landlord did not prove the claims were in bad faith); Sidal Realty Co. v. REDACTED, No. HC-030114401 (Minn. Dist. Ct. Mar. 28, 2003) (decision and order) rev'g (Minn. Dist. Ct. Feb. 12, 2003) (reversing referee's denial of expungement where there had been a dismissal for defective service of plaintiff); Project for Pride in Living, Inc. v. REDACTED, No. HC-1021121502 (Minn. Dist. Ct. Apr. 7, 2003) (decision and order) rev'g (Minn. Dist. Ct. Dec. 10, 2002) (reversing referee's denial of expungement because landlord's desire to end residential use of building "cannot be used as a pretext to ignore the covenants of habitability.").

611. Viking Props. of Minn., LLC v. Wesley, Nos. UD-1990714563, UD-1990709901 (Minn. Dist. Ct. Aug. 11, 1999) (order holding action to be expunged) (holding expungement immediately upon filing of order where eviction action was erroneously filed due to mistake or confusion).

612. Minneapolis Pub. Hous. Auth. v. Dixon, No. HC-000121514 (Minn. Dist. Ct. May 12, 2000) (citing MINN. STAT. § 484.014 (2008)) (order granting expungement) (holding expungement where landlord and tenant agreed that co-tenant, and not tenant, was the culpable party for lease violations; hence tenant's name, not co-tenant's name, was ordered for removal from the caption and computerized records).

VI. JUDGE REVIEW OF HOUSING COURT REFEREE DECISIONS

A party not in default may seek judge review of referee decisions by serving and filing a notice of review within ten days following the referee's recommendation to the court, or within thirteen days after service by mail of the written order as adopted by a judge, whichever occurs first.[613] The judge's review is based upon the record established before the referee.[614] The notice of review does not stay entry of judgment nor vacate an entered judgment, unless the petitioner requests and the referee orders a bond, payments in lieu of a bond, or waiver of a bond or payments.[615] Landlords sometimes argue that the tenant should have to pay into court the rent that was withheld, either in dispute, or not accepted by the landlord to avoid waiver, in order to have the right to judge review. The tenant is obligated only to pay the rent that comes due during the appeal, rather than rent that was allegedly due before the appeal.[616] The tenant may seek emergency judge review of the referee's scheduling order to challenge the amount the referee orders the tenant to pay into court.[617]

The petitioner must request a transcript from the referee's court reporter within one day after the notice of review is filed.

613. MINN. GEN. R. PRAC. 611(a) (2008); Connelly v. Schiff, No. HC-1000417515 (Minn. Dist. Ct. May 23, 2000) (order denying review) (involving situation where order filed eleven days after oral announcement of decision).

614. Stewart v. Anderson, No. A06-1878, 2007 WL 2366528, *3 (Minn. Ct. App. Aug. 21, 2007) (citing MINN. GEN. R. PRAC. 611(a) (2008)); Butler v. Cohns, No. C2-96-6599 (Minn. Dist. Ct. Oct. 22, 1996) (holding that Minnesota Rule of Civil Procedure 53.05(b) governed the court's scope of review, and that the court must accept the facts found by the referee unless clearly erroneous, although questions of law are reviewed de novo).

615. MINN. GEN. R. PRAC. 611(b) (2008); MINN. R. CIV. APP. P. 108, subdivs. 1, 5.

616. Minneapolis Pub. Hous. Auth. v. Kadi, No. 27-CV-HC-06-2887 (Minn. Dist. Ct. Aug. 25, 2006) (order reversing referee setting rent to be paid into court) (ordering tenant to pay only rent as it comes due during judge review); Caberallo, L.L.C v. Molin, No. HC-051207529 (Minn. Dist. Ct. Dec. 23, 2005) (order reversing referee setting rent to be paid into court) (ordering tenant to pay only rent as it comes due during judge review, and not disputed rent); Thompson v. Gates, No. UD-197011509 (Minn. Dist. Ct. Feb. 28, 1997) (order granting review) (holding tenant must pay rent as it comes due into court, rather than alleged past due rent).

617. Minneapolis Pub. Hous. Auth., No. 27-CV-HC-06-2887 (Minn. Dist. Ct. Aug. 25, 2006) (order reversing referee setting rent to be paid into court) (ordering tenant to pay only rent as it comes due during judge review); Caberallo, No. HC-051207529 (Minn. Dist. Ct. Dec. 23, 2005) (order reversing referee setting rent to be paid into court) (ordering tenant to pay only rent as it comes due during judge review, and not disputed rent).

The petitioner must make satisfactory arrangements for payment with the court reporter, or arrangement for payment *in forma pauperis*.[618] "The transcript must be provided within 5 business days after its purchase by the petitioner."[619] It appears that the parties have the option of either directly appealing from entry of judgment following the decision of the referee, or seeking judge review of the referee's decision and then appealing from entry of judgment following the judge's decision on review.[620]

VII. APPEAL

The period for appeal is ten days.[621] However, if the eviction action is consolidated with an emergency relief action,[622] rent escrow action,[623] or a tenant remedies action,[624] the appeal period is sixty days following adjudication of both actions and entry of judgment.[625] The appeal lies from entry of judgment.[626] While the Minnesota Supreme Court was willing to hear cases that were not appealed from entry of judgment by discretionary review before the creation of the court of appeals,[627] the court of appeals has not.[628] An appeal filed within ten days after the district court's order reviewing a housing court referee's determination may be timely, even if the appeal is filed more than ten days after entry of the

618. MINN. GEN. R. PRAC. 611(c) (2008).

619. *Id.*

620. *See* Hess v. Comm'r of Pub. Safety, 392 N.W.2d 586 (Minn. Ct. App. 1986); Warner v. Warner, 391 N.W.2d 870 (Minn. Ct. App. 1986).

621. MINN. STAT. § 504B.371, subdiv. 2 (2008) (formerly codified at MINN. STAT. § 566.12 (1998)).

622. *Id.* § 504B.381 (formerly codified at § 566.205 (1998)).

623. *Id.* § 504B.385 (formerly codified at § 566.34 (1998)).

624. *Id.* §§ 504B.395–.471 (formerly codified at §§ 566.19, .33 (1998)).

625. Sanchez v. Krey, No. C7-99-2078 (Minn. Ct. App. Jan. 25, 2000) (order dismissing appeal) (setting forth a sixty day appeal period for consolidated eviction and tenant remedies actions); MINN. R. CIV. APP. P. 104.01, subdiv. 1.

626. § 504B.371; Univ. Cmty. Props., Inc. v. Norton, 246 N.W.2d 858, 860 (1976); Tonkaway Ltd. P'ship v. McLain, 433 N.W.2d 443, 444 (Minn. Ct. App. 1988) (exclusive mode of appeal).

627. MINN. R. CIV. APP. P. 105; *Univ. Cmty. Props., Inc.*, 246 N.W.2d at 860; Fritz v. Warthen, 298 Minn. 54, 55–56, 213 N.W.2d 339, 340 (1973).

628. *Tonkaway Ltd. P'ship*, 433 N.W.2d 443. The court did not even respond to appellant's request for discretionary review. *Id.* at 443–44. *But see* Chancellor Manor v. Edwards, No. C1-01-197, 2001 WL 826842, at *1 (Minn. Ct. App. July 24, 2001). Despite the respondent's argument that the appellant incorrectly appealed from the district court's December 22, 2001 order rather than from the judgment entered February 1, 2001, the court of appeals construed the appeal to be from the February 1, 2001 judgment. *Id.*

referee's eviction judgment.[629] To avoid dismissal of the appeal as moot, the tenant must seek to remain in possession of the property during the appeal, or not vacate voluntarily.[630] As an alternative to appeal where emergency relief is necessary, the tenant may request a writ of prohibition in some circumstances.[631]

VIII. CONCLUSION

An eviction case can be as simple as determining whether the tenant paid the rent or breached the lease, or failed to vacate after expiration of a lease or proper notice from the landlord. However, making that assumption can lead a landlord to misjudge the likelihood of success, and lead a tenant to forgo the enforcement of rights. Only by fully understanding the mixture of state statutes,

629. In *JBI & Assocs., Inc. v. Soltan*, the court of appeals noted that a request for review of the referee's determination is comparable to a motion for amended findings, and tolls the appeal period until the district court rules on the request. No. A05-1031, 2006 WL 1229484, at *1–2 (Minn. Ct. App. May 9, 2006). Counsel still should request stay or vacation of entry of judgment during judge review, and entry of a new judgment following judge review, to avoid expiration of the appeal period while pursuing judge review. *Id.*

630. Real Estate Equity Strategies, LLC v. Jones, 720 N.W.2d 352, 355 (Minn. Ct. App. 2006) (holding that an appeal is not moot where tenant vacates property involuntarily); Lanthier v. Michaelson, 394 N.W.2d 245, 246 (Minn. Ct. App. 1986) (dismissing the case as moot where the tenant appealed but vacated the apartment without posting the bond or paying rent into court); Scroggins v. Solchaga, 552 N.W.2d 248, 252–53 (Minn. Ct. App. 1996) (allowing appeal where there was a removal of the tenant from the property by executing the writ, and distinguishing *Lanthier* on the grounds that there, the tenant moved out voluntarily rather than being forced to move out by execution of the writ); Beaumia v. Eisenbraun, No. A06-1482, 2007 WL 2472298, at *2 n.1 (Minn. Ct. App. Sept. 4, 2007) (finding that nothing in the record showed that the tenants had vacated the property); Hybben v. Constantine, No. C9-02-734, 2002 WL 31655335, at *1 (Minn. Ct. App. 2002) (holding appeal moot where tenant decided at a hearing to set supersedeas bond that he would voluntarily move) (citing *Lanthier*); Noonan v. Jacob Props., Inc., C7-98-810, 1998 WL 846534, at *1 (Minn. Ct. App. Dec. 8, 1998) (dismissing the case as moot where commercial tenant appealed from a judgment of restitution, "paid rent and posted a cost bond to suspend the execution of the landlord's writ of restitution during this appeal," but "voluntarily vacated the premises at the end of the lease term and failed to exercise its unilateral option to renew the lease.").

631. *See* MINN. R. CIV. APP. P. 120–121. Requests for writs in eviction actions have involved challenges to (1) a trial court order for new trial, and (2) execution of a writ of restitution against tenant who was not a party to the eviction action, nor named in the writ. Stock v. Beaulieu, No. C4-95-989 (Minn. Ct. App. May 9, 1995) (findings of fact, conclusions of law, and summary of order) (writ granted); Kowalenko v. Haines, No. C6-85-1365 (Minn. Ct. App. July 23, 1985) (order) (writ granted). Minnesota Rule of Civil Appellate Procedure 121 provides for making an oral request in emergencies.

federal law, and common law of property and contracts, can counsel for landlords and tenants adequately advise and represent such clients.